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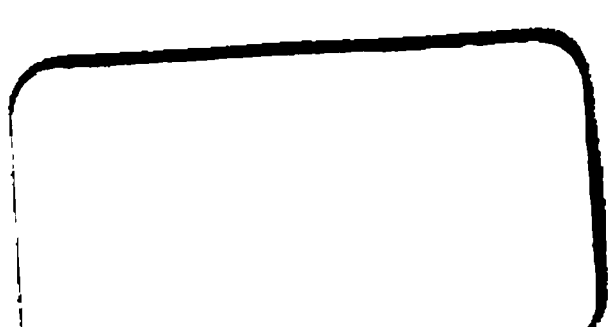
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ADJUDICATED FORMS
OF
PLEADING AND PRACTICE

WITH
ANNOTATIONS AND CORRELATIVE
STATUTES

ADAPTED TO USE GENERALLY IN ALL CODE STATES AND TERRI-
TORIES, AND IN PARTICULAR TO THE FOLLOWING: ALASKA,
ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, HAWAII,
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AND WYOMING.

BY
JOHN G. JURY
OF THE SAN FRANCISCO BAR

IN TWO VOLUMES
VOLUME II

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§ 309. CODE PROVISIONS.

Sale defined.

California, § 1721. Sale is a contract by which, for a pecuniary consideration, called a price, one transfers to another an interest in property. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5079. North Dakota, Rev. Codes 1905, § 5394.
South Dakota, Rev. Codes 1903, C. C. § 1299.

For agreements to sell and purchase, see ch. LXXXV.

Warranty on sale by sample.

California, § 1766. One who sells or agrees to sell goods by sample, thereby warrants the bulk to be equal to the sample. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Arizona, Laws 1907, p. 229, § 16(a). Idaho, Rev. Codes 1909, § 3325.
Montana, Rev. Codes 1907, § 5106. North Dakota, Rev. Codes 1905, § 5420.
South Dakota, Rev. Codes 1903, C. C. § 1325.

* Arizona, Laws 1907, pp. 229, 235, § 16. (a) There is an implied warranty that the bulk shall correspond with the sample in quality. * * * (Enacted March 17, 1907.)

§ 310. COMPLAINTS [OR PETITIONS].

FORM No. 607—For breach of warranty of title.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant sold and delivered to the plaintiff [state what], for the sum of \$, then paid him by the plaintiff.

2. That by the said contract of sale it was understood by the plaintiff and defendant to be, and it was a part of the terms and consideration of said contract of sale, that the defendant had the lawful right and title to so sell and to transfer the ownership of said goods to the plaintiff.

3. That the defendant had in fact no title in or to or right to sell said goods, but the same belonged to one L. M., who thereafter, on the day of , 19 , demanded possession of the same from the plaintiff; that the plaintiff was compelled and did then deliver them up to L. M., and they were wholly lost to the plaintiff.

4. That by reason of the premises the plaintiff was misled and injured, to his damage in the sum of \$.

[Concluding part.]

FORM No. 608—On warranty of note.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant, for a valuable consideration, offered to pass to the plaintiff a promissory note, of which the following is a copy: [Copy of note], then and there warranting said note to have been made by the said L. M.

2. That the plaintiff, confiding in and relying upon said warranty, purchased said note of the defendant, and paid him therefor the sum of \$.

3. That the said note was not made by said L. M., but that his name was forged thereto.

4. That by reason of the premises the plaintiff was misled and injured, to his damage in the sum of \$.

[Concluding part.]

FORM No. 609—For breach of warranty as to judgment.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant, for a valuable consideration, duly assigned to the plaintiff a judgment which he had, on the day of , 19 , recovered in the court of the county of , for the sum of \$, in a certain action wherein Y. Z., the defendant herein, was plaintiff, and one L. M. was defendant.

2. That said assignment contained a covenant on the part of the defendant, whereby he warranted that there was due upon said judgment from the said L. M. the said sum of \$, with interest thereon from the day of , 19 .

3. That in truth, at the time of said assignment, said judgment had been paid in full to the defendant, and no part thereof was or now is due thereon.

4. That by reason of the premises the plaintiff was misled and injured, to his damage in the sum of \$.

[Concluding part.]

FORM No. 610—For breach of warranty on sale by sample.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant sold to the plaintiff [state what], by producing to him a pretended sample thereof, and warranted said [article] to be equal in quality and description to such sample.

2. That said [article] was not equal in quality and description to said sample, but, on the contrary, was greatly inferior in quality thereto.

3. That by reason of the premises the plaintiff was misled and injured, to his damage in the sum of \$.

[Concluding part.]

FORM No. 611—For breach of warranty of quality of fruit-trees.

(In *Murphy v. Stelling*, 8 Cal. App. 702; 97 Pac. 672.)

[Title of court and cause.]

Plaintiff complains of defendants, and alleges:

1. That on or about the 25th day of February, 1894, the plaintiff applied to the defendants to purchase apricot trees of the number and variety hereinafter mentioned, and the defendants on said date sold and delivered to the plaintiff, 521 apricot trees, and then and there, at the time of said sale, represented and warranted to plaintiff that said trees were of the Blenheim variety.

2. That plaintiff relied solely upon the representations and warranty so made to him by defendants, as aforesaid, that said trees were of the Blenheim variety, and paid defendants therefor the sum and price by them demanded, to wit, the sum of \$65.

3. That plaintiff, on and about the 10th day of March, 1894, planted said trees upon land owned by him, and has continually from the date of said planting up to August, 1898,—that is to say, for a period of four years,—bestowed upon said trees, in the care thereof, great skill, attention, and proper cultivation.

4. That said trees did not bear fruit until in or about the month of August, 1898, and plaintiff then first discovered that 207 of said trees were not of the Blenheim variety, but that they were, and each of them was, of another and inferior and worthless variety, and of no value whatever to plaintiff; that plaintiff did not know, nor could he ascertain prior to the fruitage season of 1898, that said 207 trees were not of the Blenheim variety so purchased and paid for by him, and so represented and warranted by defendants as aforesaid, nor could he know or discover by ordinary diligence that they were not of said Blenheim variety prior to said fruitage season, and until in or about August of said last-named year.

5. That the land of plaintiff upon which said inferior and worthless trees were planted, and upon which the same are now growing, is worth the sum of \$1,000 less than said land would be worth were the said trees growing thereon of the Blenheim variety, which plaintiff supposed he had purchased, and which he had paid for as aforesaid.

6. That by reason of the loss of the crops from said 207 trees for the years 1898 and 1899, plaintiff has sustained great loss and damage in the further sum of \$387.50; that by reason of the care and cultivation bestowed upon said 207 trees of said inferior and worthless variety, plaintiff has sustained further loss and damage in the sum of \$120; that by reason of the failure of said defendant to furnish plaintiff said 207 trees of said Blenheim variety, so paid for and supposed to have been purchased by plaintiff as aforesaid, plaintiff has sustained further loss and damage in the amount so paid defendant by plaintiff for said 207 trees, namely, the sum of \$25.85.

Wherefore, plaintiff prays judgment for the several amounts hereinabove set forth,—that is to say, for the sum of \$1,533.35, together with his costs herein expended.

[Verification.]

Nicholas Bowden,
Attorney for plaintiff.

FORM No. 612—Against a foreign corporation, to rescind a contract for breach of warranty of quality, and to recover part of purchase price paid.

(In *Kullman, Salz & Co. v. Sugar A. M. Co.*, 153 Cal. 725; 96 Pac. 369.)

[Title of court and cause.]

Now comes the plaintiff in the above-entitled action, and for cause of action, alleges:

1. [Averment as to incorporation of the plaintiff company.]
2. [Averment as to defendant company as a foreign corporation.]
3. That heretofore, to wit, on or about the 20th day of June, 1900, the plaintiff and the defendant entered into a contract in writing for the purchase and sale of a Lillie triple-effect evaporator, which said contract is in words and figures as follows, to wit: [Here follows copy of contract.]
4. That the said apparatus mentioned in said written contract was warranted to evaporate 300 gallons of water per hour, as specified therein; that the apparatus delivered to plaintiff under said contract was not capable, under the conditions specified, all of which were observed fully by plaintiff, to evaporate 300 gallons of water under the conditions as specified in said contract, but failed very largely to accomplish the work required thereof, and was incapable of evaporating more than [200] gallons per hour under said conditions.
5. That plaintiff believed the representations of defendant, and entered into said contract solely by reason of said representations and the said warranty therein contained, and plaintiff was unable to ascertain the truth or falsity of said representations before entering into said contract.
- 6, 7. [Here follow averments as to the inefficiency of the machine supplied, and notice given to defendant that it did not meet the requirements of the contract.] * * * And plaintiff offered to return said apparatus to defendant upon receiving a satisfactory machine or the amount theretofore paid by plaintiff on account of the purchase price of said apparatus.
8. That plaintiff has paid on account of the purchase price of said machine, and expended thereon in an endeavor to cause the same to perform the work required as specified in said contract, the sum of \$2,132.31, no part of which sum has been paid to plaintiff by

defendant, nor has any satisfactory machine been furnished to plaintiff by defendant in place of the one furnished under said contract.

9. That previous to the commencement of this action plaintiff notified defendant of its rescission of said contract by reason of the failure of defendant to furnish a machine in accordance with the terms of said contract.

Wherefore, plaintiff prays, that it be adjudged and decreed that said contract is void, and that plaintiff have judgment against defendant for the sum of \$2,132.31, with interest on the payments made from the dates of said payments, and for costs of suit.

M. B. Kellogg,

A. E. Shaw,

Attorneys for plaintiff.

[Verification.]

FORM No. 613—For breach of warranty on sale of work animals.

(In *Sierra L. & C. Co. v. Bricker*, 3 Cal. App. 190; 85 Pac. 665.)

[Title of court and cause.]

Now comes the plaintiff, and for cause of action alleges:

1. [Averment of incorporation of plaintiff company.]

2. [Averment as to defendants as copartners.]

3. That on or about the 4th day of April, 1904, at Los Angeles, California, plaintiff purchased from defendants two mares upon the following express representations of defendants, and warranty in writing, that said animals were sound and without blemish, a copy of which is as follows, to wit: [Here copy of agreement is set out.]

4. That on or about the said 4th day of April, 1904, plaintiff paid defendants the sum of \$360 for said animals, and expended [here are set forth other payments and expenses which defendants agreed to refund if the team was not as represented].

5. That after a thorough test had been made plaintiff discovered that * * * neither of said mares was sound or without blemish, in this: [Here defects are specified.]

6. That on or about April 23, 1904, plaintiff notified defendants that said animals were not satisfactory; that they were both unsound and blemished, and offered to return the same, and demanded a return of the purchase price, but defendants refused to receive the said animals, and still refuse to receive them.

7. That plaintiff has fed and cared for said team from April 5, 1904, and is still caring for the same; that \$2 per day is a reasonable sum for the feed and care of the said animals [etc.].

[Prayer for judgment.]

[Verification.]

Hahn & Hahn,

Attorneys for plaintiff.

FORM No. 614—For breach of warranty on sale of stallion.

(In *Watson v. Roode*, 43 Neb. 348; 61 N. W. 625.)

[Title of court and cause.]

1. The plaintiff complains of the defendant for that on the 18th day of November, 1884, the defendant, as an inducement to plaintiff to purchase from him, defendant, a certain imported black stallion called "Knight of the Shires," for the sum of \$2,000, warranted the said horse to be a foal-getter and sound in every respect; * * * that his, defendant's, title to the same was clear, and that said horse was registered in the studbook of England, as also was his dam and sire, and that he, defendant, would furnish the secretary's receipt for such pedigree; and plaintiff, relying on said warranty and statements, purchased said horse from the defendant for the sum of \$2,000, then duly paid.

2. Plaintiff avers that said horse, at the time of said sale, was unsound in this: That [here the defects are set forth]; that because of said defects said horse was of no value whatever; that [here are stated other defects and maladies of the horse], all of which the said horse had at the time of the said purchase, and which, combined, caused the death of said horse on the 16th day of June, 1886.

3. Plaintiff avers that the pedigree of said horse was not as warranted by the defendant, and that the defendant never has furnished the secretary's receipt for such pedigree, as agreed to be done on the part of the defendant.

4. Plaintiff avers that said horse was not a foal-getter, and by reason of the above premises plaintiff has sustained damages in the sum of \$5,000.

[Prayer, etc.]

FORM No. 615—For breach of warranty of fitness for designated purpose.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant sold and delivered to the plaintiff [stating what], for the purpose

[stating what], for valuable consideration, and then and there, as part of the contract of sale, warranted the same to be fit and proper for such purpose.

2. That the said [articles] were not then, nor since, reasonably fit or proper to be used for [designating purpose].

3. That the plaintiff, confiding and relying upon said warranty, did on the day of , 19 , expend \$ in using and applying said articles on .

4. That by reason of the premises the plaintiff was misled and injured, to his damage in the sum of \$.

[Concluding part.]

§ 311. ANSWERS.

FORM No. 616—Defense of denial of warranty.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]: Defendant denies that he promised or represented to the plaintiff that the said [horse] was sound or gentle or quiet in harness; but alleges that the plaintiff purchased said [horse] with notice [state defect, if any], and not confiding in or relying upon any representations of the defendant.

[Etc.]

FORM No. 617—Denial of breach of warranty.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]: Defendant alleges that at the time of the sale mentioned therein said horse was sound [etc., following terms of warranty].

[Etc.]

FORM No. 618—Counterclaim on breach of warranty.

[Title of court and cause.]

The defendant, for a counterclaim herein, alleges that at the time of the sale of the goods in the complaint mentioned the plaintiff represented and warranted that [here allege the warranty].

[Allege breach of said contract of warranty, the particulars thereof, and the damages resulting to defendant therefrom.]

[Etc.]

§ 312. ANNOTATIONS.—Sale and warranty.

- 1, 2. Remedies where breach of warranty occurs.
3. Profits under "general damage" clause.
- 4, 5. Defense of failure of consideration.
6. Liability of vendor of article to third person.

1. Remedies where breach of warranty occurs.—In the case of an executed sale, the buyer may accept, although the goods do not comply with the warranty, and recover damages for the breach: *Davidson Bros. Co. v. Smith* (Iowa), 121 N. W. 503.

2. The defendant is entitled to rely on whichever defense the evidence tends to establish, where the question is submitted by the pleadings as to whether the acts of defendant constituted a rescission, or whether they were consistent with an intention to claim damages for breach of warranty: *Davidson Bros. v. Smith* (Iowa), 121 N. W. 503; *Bruner v. Brotherhood of American Yeomen*, 136 Iowa 612, 111 N. W. 977; *Cole v. Laird*, 121 Iowa 146, 96 N. W. 744; *Mallory Com. Co. v. Elwood*, 120 Iowa 632, 95 N. W. 176; *Thorson & C. Co. v. Baker*, 107 Iowa 49, 77 N. W. 510.

3. Profits as general damages.—Damages which plaintiff sues for in a case to recover for breach of warranty of quality of goods sold by defendant, and profits which plaintiff alleges it would have made if the goods had been as warranted, may be recovered as general damages, and it is not necessary that the "profits" be specially alleged: *German Fruit Co. v. Armsby Co.*, 153 Cal. 585, 590, 96 Pac. 319; *Tahoe Ice Co. v. Union Ice Co.*, 109 Cal. 242, 41 Pac. 1020.

4. Defense of failure of consideration.—Proof of failure of consideration, standing alone, would, if properly pleaded, be a good defense in a suit on a note by the payee against the makers, but will not support a case bottomed on a warranty and a breach thereof: *Crenshaw v. Looker*, 135 Mo. 375, 84 S. W. 885; *Brown v. Weldon*, 27 Mo. App. 251, 99 Mo. 564, 13 S. W. 342.

5. But this does not mean that proof of want of consideration, when pleaded in a case on breach of warranty, would

not be good. In an action upon a promissory note given for the purchase price of an article bought for a particular purpose, whether upon an express or implied warranty, with or without fraud, it is not necessary that the purchaser should return the article or offer to return it, or to rescind the contract, or that such article should be wholly worthless, in order that he may avail himself of his plea of failure of consideration; yet, if he retains the article, and does not offer to return it, and such article is not wholly worthless, such plea can avail him only so far as to defeat a recovery on the note to the extent of the difference between the value of the article, had it been such as it was represented to be, and its value such as it was shown really to be: *Broderick v. Andrews*, 135 Mo. App. 57, 115 S. W. 519, 520; *Brown v. Weldon*, 27 Mo. App. 251, 99 Mo. 564, 13 S. W. 342; *Shepherd v. Padgett*, 91 Mo. App. 473; *Miles v. Withers*, 76 Mo. App. 87; *Fairbanks v. Baskett*, 98 Mo. App. 53, 71 S. W. 1113; *Williams v. Baker*, 100 Mo. App. 284, 73 S. W. 339; *Ferguson Implement Company v. Parmer*, 123 Mo. App. 300, 107 S. W. 469.

6. Liability of vendor of article to a third person.—The manufacturer of machinery is not liable to a person, other than the vendee, for an injury caused by breakage, in those cases where the article sold is not inherently of a dangerous character: *Heizer v. Kingland etc. Mfg. Co.*, 110 Mo. 606, 19 S. W. 630, 33 Am. St. Rep. 482, 15 L. R. A. 821. See *Roddy v. Missouri Pacific R. Co.*, 104 Mo. 234, 15 S. W. 1112, 24 Am. St. Rep. 333, 13 L. R. A. 746; *Gordon v. Livingston*, 12 Mo. App. 267; *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513; *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638; *National Sav. Bank v. Ward*, 100 U. S. 195, 25 L. ed. 625.

CHAPTER LXXXV.

Breach of Contracts of Sale and Purchase, and of Miscellaneous Contracts:

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§ 313. CODE PROVISIONS.

Agreement to sell defined.

California, § 1727. An agreement to sell is a contract by which one engages, for a price, to transfer to another the title to a certain thing. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Arizona, Laws 1907, p. 229, § 1, sub. 1. Montana, Rev. Codes 1907, § 5082. North Dakota, Rev. Codes 1905, § 5397. South Dakota, Rev. Codes 1903, C. C. § 1302.

• Arizona, Laws 1907, p. 229, § 1. (1) A contract to sell goods is a contract whereby the seller agrees to transfer the property in goods to the buyer for a consideration called the price. * * * (Enacted March 21, 1907.)

Agreement to buy defined.

California, § 1728. An agreement to buy is a contract by which one engages to accept from another, and pay a price for the title to a certain thing. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5083. North Dakota, Rev. Codes 1905, § 5398. South Dakota, Rev. Codes 1903, C. C. § 1303.

Agreement to sell and buy defined.

California, § 1729. An agreement to sell and buy is a contract by which one engages to transfer the title to a certain thing to another, who engages to accept the same from him and to pay a price therefor. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5084. North Dakota, Rev. Codes 1905, § 5399. South Dakota, Rev. Codes 1903, C. C. § 1304.

Property subject of agreement for sale.

California, § 1730. Any property which, if in existence, might be the subject of sale, may be the subject of an agreement for sale, whether in existence or not. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* **Arizona, Laws 1907, p. 229, § 5, subs. 1, 2. Montana, Rev. Codes 1907, § 5085. North Dakota, Rev. Codes 1905, § 5400. South Dakota, Rev. Codes 1903, C. C. § 1305.**

* **Arizona, Laws 1907, pp. 229, 231, § 5.**
(1) The goods which form the subject of a contract to sell may be either existing goods, owned or possessed by the seller, or goods to be manufactured or acquired by the seller after the making of the contract to sell, in this act called "future goods."

(2) There may be a contract to sell goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. * * * (Enacted March 21, 1907.)

Sale at auction—Rights of buyer.

California, § 1796. If, at a sale by auction, the auctioneer, having authority to do so, publicly announces that the sale will be without reserve, or makes any announcement equivalent thereto, the highest bidder in good faith has an absolute right to the completion of the sale to him; and, upon such a sale, bids by the seller, or any agent for him, are void. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5126. North Dakota, Rev. Codes 1905, § 5440.
South Dakota, Rev. Codes 1903, C. C. § 1345.

§ 314. COMPLAINTS [OR PETITIONS].

FORM No. 619—For breach of contract of sale and to recover for goods sold.

(Adapted from *Savage v. Salem Mills Co.*, 48 Ore. 1; 85 Pac. 69; 10
Am. & Eng. Ann. Cas. 1065.)

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That the defendant is, and during all times herein mentioned has been, a corporation duly organized and existing under and by virtue of the laws of the state of Oregon, and doing therein a general milling business; that at all the times mentioned in this complaint, and for many years prior thereto, the defendant had owned and operated a flouring-mill, having in conjunction therewith, and connected thereto by stationary mechanical wheat-conveyors, a storage-house, to hold and retain wheat received by it until such wheat shall be sold or manufactured into flour or other mill products; that during all the times herein mentioned it was the custom and usage of the defendant to receive wheat from the farmers, giving load-checks therefor, showing the name of the person from whom received, the date and number of bushels, and thereafter, at the convenience of the parties, issue a receipt to the holders of such load-checks, a copy of which receipt is hereunto annexed and made a part of this complaint, and marked "Exhibit A"; that it was also during all said times the custom and usage of the defendant, known and agreed to by the parties delivering wheat to it, to mix the wheat received with its consumable stock, and to sell the same, or grind it into flour and sell the flour at its pleasure, and to retain the proceeds thereof; and that the party delivering the wheat, by paying 2½ cents per bushel for storage and 3½ cents per bushel for sacks, could demand payment for the wheat so delivered in merchantable wheat at any time before the 1st day of July next following the delivery, subject, however, to the defendant's preferred right to purchase, but in case such demand should not be made prior to the date stated, it shall be optional with the defendant whether to pay the quantity price of wheat of the kind and quantity delivered at the date of the demand, or deliver an equal quantity of merchantable wheat upon the payment of the storage and for sacks.

2. That said custom and usage were known and agreed to by all parties doing business with the defendant, and in delivering wheat, and in issuing the receipt mentioned, the parties contracted with reference to such usage and custom, and such receipt was based upon and controlled thereby.

3. That on the day of August, 1899, the plaintiff delivered to the defendant, at its mill, 2,092 bushels and 12 pounds of merchantable wheat, and received from it the customary load-checks therefor; that such wheat was delivered to and accepted by the defendant under and in accordance with such usage and custom, and not otherwise, and the same constituted and was the contract in reference thereto; that no part of the wheat so delivered was ever returned to the plaintiff or paid for in money or in kind, except 55 bushels and 12 pounds, paid in mill-feed and flour, leaving a balance of 2,037 bushels due the plaintiff; that soon after receiving the wheat the defendant sold and disposed of the same and applied the proceeds to its own use; that on August 17, 1901, the plaintiff tendered to defendant the requisite amount for storage and for sacks, and demanded the delivery to him of 2,037 bushels of merchantable wheat, or the payment of fifty cents a bushel, the value thereof, but defendant refused to do either.

Wherefore, the plaintiff prays judgment against the defendant for the value of said wheat retained by the defendant and undelivered as aforesaid, amounting to \$, and for interest thereon from the date of the demand aforesaid, and for costs.

[Verification.]

W. T. Slater, and
W. M. Kaiser,
Attorneys for plaintiff.

FORM No. 620—For breach of contract to furnish engine and engineer at opening of threshing season.

(Adapted from *Hoskins v. Scott*, 52 Ore. 271; 96 Pac. 1112.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

That on the day of , 19 , the defendant, for a valuable consideration, agreed with the plaintiff to furnish plaintiff an engine and a competent engineer to run plaintiff's machine purchased by plaintiff from defendant, during the threshing season of the year 1906, commencing on or about the day of , and ending on

or about the day of in said year; that the plaintiff, relying on said promise of the defendant, made the necessary arrangements, including procurement of the complement of men necessary to begin and carry on successfully threshing during and for said season, and made all necessary arrangements at the opening of said season, pursuant to said contract and promise of the defendant; that the plaintiff performed in all respects said contract upon his part, and notified defendant in due time that plaintiff expected defendant to be ready with the engine and engineer at the opening of the threshing season, as promised, so that plaintiff could engage in threshing during said season, and demanded of defendant that he furnish the engine and engineer according to their contract, which defendant neglected and refused to do during said season or at any time, to the damage of the plaintiff in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for the sum of \$ damages and costs of suit.

A. B., Attorney for plaintiff.

FORM No. 621—For breach of contract in furnishing irrigating plant.

(In *Irvine v. Rapp*, 9 Cal. App. 375; 99 Pac. 409.)

[Title of court and cause.]

1-8. [After introductory part, averments of copartnership, of agreement to furnish pumping plant, and breach of said agreement, the complaint, with reference to defendants' default and the damages occasioned by said breach, proceeds as follows:]

9. * * * That defendants have wholly failed, neglected, and refused, and do now refuse, to remedy such defects, or to supply such omitted parts, or to perform their said contract in these respects; that plaintiff was thereby, by the acts of defendants, compelled to employ other parties to remedy such defects and supply such omitted parts, all at a necessary cost to plaintiff in the premises of the sum of \$250.

10. That solely by reason of, and as the immediate and direct and necessary result of, the said failure of defendants to perform their said contract plaintiff was prevented from irrigating said alfalfa or any thereof during the said months of June and July, 1900, or at any time thereafter; that in consequence all said alfalfa died and was lost to the plaintiff; that as a further and necessary consequence of said failure of defendants to perform their said contract in the time stipulated in said agreement, plaintiff suffered a loss of a subsequent and

second crop of alfalfa, all of which alfalfa could have been saved and crops harvested if defendants had duly performed their said contract; that plaintiff was damaged by the loss of said two crops of alfalfa in the sum of \$2,577.50.

Wherefore, plaintiff prays judgment against defendants in the sum of \$2,827.50, together with interest thereon and costs, and for such other and further relief as shall appear to be just.

[Verification.]

George W. Towle,
Attorney for plaintiff.

FORM No. 622—Upon contract to purchase stock in default of corporation to pay dividends.

(Adopted from *Marinovich v. Kilburn*, 153 Cal. 638; 96 Pac. 303.)¹

[Title of court and cause.]

Comes now the above-named plaintiff, and, complaining of the above-named defendant, for cause of action alleges:

1. That heretofore, to wit, on the 21st day of July, 1903, defendant entered into a contract in writing with plaintiff, wherein defendant agreed that, if the plaintiff would pay to the Watsonville Transportation Company, a corporation, in full for 50 shares of its capital stock, at the rate of \$60 per share, defendant would, in the event of the non-payment by said company of an annual dividend of not less than 3½ per cent upon the said purchase price of said stock, pay to plaintiff said sum, to wit, 3½ per cent upon said purchase price, and, further, * * * would thereupon purchase said stock at any time, upon the request of plaintiff, and after the default of the company in paying said dividend; that by said agreement defendant further promised to pay plaintiff for said shares of stock, in the event of said

¹ The complaint in this action, as the same appears from the records thereof, shows that prior to the date of the agreement to repurchase the stock in the event of default of the corporation to pay a dividend or dividends the plaintiff had agreed with the company to purchase the fifteen shares of stock, and had made a partial payment thereon of \$750, and that, to induce the plaintiff to pay the balance upon said obligation, the agreement aforesaid was made. The court in reversing the case stated that there was no sufficient consideration for the agreement on the part of the defendant to buy the stock and pay the plaintiff \$3,000 therefor in the event of the default of the corporation to pay dividends, inasmuch as it had already become the plaintiff's duty to perform the obligation which he had entered into and upon which he had made a partial payment; and held, further, that the consideration of the original contract could not attach to the subsequent promise. (The form here given assumes an original contract upon the strength of defendant's promise to repurchase, and the averment showing that the party making the promise to repurchase was a stockholder in the company implies a consideration): *Marinovich v. Kilburn*, 153 Cal. 638, 96 Pac. 303, 304.

default, the sum of \$60 per share, cash, upon the delivery of the same to defendant and of the certificate therefor properly endorsed by plaintiff to defendant.

2. That thereupon, and on said 21st day of July, 1903, plaintiff paid to said company, the sum of \$3,000, the purchase price of said shares of stock, and thereupon received a certificate therefor; * * * that said purchase price was paid in contemplation of and pursuant to said written promise of defendant, he being at and before said time a stockholder in and officer of said corporation.

3. [Here follows averment as to the default of said company in the payment of any dividend.]

4. That on the 30th day of March, 1905, plaintiff requested defendant to purchase said 50 shares of said capital stock of the Watsonville Transportation Company, and to pay him therefor the sum of \$60 per share, as theretofore agreed as aforesaid, and at said time tendered to defendant the said certificate of stock to said Watsonville Transportation Company for said 50 shares of capital stock thereof properly endorsed to defendant by the plaintiff.

5. That defendant has wholly failed, neglected, and refused to accept said certificate of stock, or to pay the said purchase price of said shares of stock, at the rate of \$60 per share, or at any other rate whatever, and that said shares of stock are, and each of them is, without any value whatever; that on account of the defendant's refusal to purchase the same as agreed upon, plaintiff has sustained damages in the sum of \$3,000.

Wherefore, plaintiff prays judgment of this court against defendant for \$3,000 and costs of suit.

[Verification.]

Charles M. Cassin,
Attorney for plaintiff.

FORM No. 623—For breach of an option contract to repurchase stock.

(In *Raiche v. Morrison*, 37 Mont. 244; 95 Pac. 1061.)

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That on the 18th day of September, 1903, in consideration of the sum of \$1,000 paid by the plaintiff to the defendant, the defendant sold and delivered to the plaintiff twenty shares of the capital stock of the Minneapolis and Montana Live Stock Company, and agreed

with the plaintiff to repurchase the said shares of stock from the plaintiff at the expiration of three years from the said date for the sum of \$1,720, this latter agreement being a memorandum as follows: "Harlem, Mont., Sept. 18, 1903. Three years from the date hereof I agree to pay J. H. Raiche \$1,720 for 20 shares in the Minneapolis and Montana Live Stock Company. J. R. Morrison. Witnesses, Hunter Hardaway and John R. Ressler."

That the plaintiff thereafter, to wit, on the day of , 1906, notified the defendant he would accept the option to repurchase, and at the expiration of the period of the said three years tendered to the defendant the said certificate representing the twenty shares of said stock duly endorsed, and an assignment of the said certificate to the defendant, and thereupon demanded \$1,720, the price agreed upon, but that the defendant refused to accept the said or any certificate, and declined to pay the defendant the said sum of \$1,720 or any part thereof; that by reason thereof the plaintiff has been damaged in the sum of \$1,720.

Wherefore, the plaintiff prays judgment for the said sum of \$1,720, and interest thereon, and the costs of suit.

[Verification.]

Sands & O'Keefe,
Attorneys for plaintiff.

FORM No. 624—For breach of contract for purchase of fruit.

(In Ellsworth v. Knowles, 8 Cal. App. 630; 97 Pac. 690.)

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1. That W. G. Knowles and Frank J. Knowles were on the 5th day of July, 1905, and ever since have been, copartners doing business under the firm name and style of Knowles Brothers.

2. That on or about the 6th day of July, 1905, plaintiff agreed with said copartnership, to buy of it, and said copartnership agreed to sell to the plaintiff, and to deliver to him, 150 12½-pound kilo boxes of choice apricots at five and seven-eighths cents per pound, boxed, less five per cent, the buyer to furnish lace paper with usual allowance, labels to be furnished by buyer free; that said apricots under said contract were to be delivered by said copartnership to said plaintiff in the month of August, 1905, f. o. b. San Jose, Santa Clara County, California, sight draft for the purchase price of said apricots to accompany bill of lading.

3. That the time of said contract for the delivery of said apricots has elapsed, and that plaintiff has always been ready, able, and willing to furnish said lace paper and labels, and has many times prior to the time for the delivery of said apricots under said agreement of sale offered to deliver said lace paper and labels in accordance with said agreement, and has always been ready, willing, and able to receive said apricots and to pay for them at the price aforesaid upon the presentation of sight draft for the purchase price attached to the bill of lading of said apricots, according to the terms of said agreement, of all of which the said copartnership had notice.

4. That the said copartnership has not delivered said apricots, or any part thereof, to the plaintiff.

5. That in the month of August, 1905, and within such period after the time agreed upon as aforesaid for the delivery of said fruit as would have sufficed for plaintiff to purchase the same quantity of fruit of like quality and kind, plaintiff would have been required to pay in the market of said Santa Clara County the sum of \$1,442.89 more for said fruit than said contract price, and said fruit at the said time agreed upon for the delivery of the same, and within said period thereafter, would have been worth to plaintiff the sum of \$1,442.89 more than said contract price.

6. That by reason of the premises the plaintiff has thereby sustained damages in the sum of \$1,442.89.

And for another, further, and separate cause of action, plaintiff alleges:

[Here follows a repetition of the allegations in the first cause of action, except that the second cause is upon a contract of a later date, to wit, July 25, 1905, for an additional 1,250 25-pound boxes of fruit at six and three-ninths cents per pound, and 1,250 25-pound boxes at seven and one-eighth cents per pound, less brokerage, etc. The damages for breach of contracts of July 25, 1905, are alleged to be the sum of \$1,375.]

Wherefore, plaintiff prays judgment for the sum of \$2,817.89 and for costs of suit.

[Verification.]

L. B. Archer, and
Wm. P. Veuve,
Attorneys for plaintiff.

FORM No. 625—Averments as to damages for breach of contract to purchase oil.

(In *Central Oil Co. v. Southern Refining Co.*, 154 Cal. 165; 97 Pac. 177.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1-6. [After preliminary averments, as to the execution of the contract to purchase, breach of the agreement by the defendant, offer to perform on the part of the plaintiff, etc., the averments as to damages are set forth as follows:]

7. That under the contract of purchase made by the plaintiff with the defendant, the defendant agreed to pay for said oil at the rate of seventy cents per barrel of forty-two gallons each; that the freight on oil of the character agreed to be sold under said contract from Whittier, Los Angeles County, California, (the contract providing for sale of the oil at the wells, at Whittier, in said county,) to Los Angeles City, California, where the same was to be delivered, was at all times since said contract was made, ten cents per barrel; that since said contract of sale was made and said oil sold by the plaintiff to the defendant, the price of oil of the kind and character described in said agreement has grown less, and has varied from time to time.

8. That when the defendant failed and refused to accept the 5,000 barrels of oil agreed to be taken by the defendant during the month of August, 1904, the plaintiff sought to sell the same on the market, but was unable to sell the same at any time before the commencement of this action; that the plaintiff is informed and believes, and upon such information and belief alleges, that the value to the plaintiff and the market price and value of the oil sold by the plaintiff to the defendant under the contract set out in the complaint, and which oil the defendant failed and refused to receive and accept during the month of August, 1904, was the sum of thirty cents per barrel at the place of delivery and at the time when the same was to be delivered; [here follows similar averments with reference to oil which was to be delivered during the months of February, March, April, May, and June, 1905;] that the plaintiff is informed and believes, and therefore alleges, that the profit which would accrue to the plaintiff upon the 15,000 barrels of oil which was agreed to be taken by the defendant during the months of April, May, and June, 1905, would amount to the sum of \$4,500.

9. That by reason of the failure, refusal, and neglect of the defendant to receive and accept the oil so purchased by the defendant from the plaintiff, and to carry out the contract entered into between the plaintiff and defendant, as hereinbefore set forth, plaintiff has been damaged in the sum of \$9,000.

Wherefore, plaintiff prays judgment against defendant for the sum of \$9,000, and for costs of suit.

[Verification.]

Percy R. Wilson,
Attorney for plaintiff.

§ 315. ANSWERS.

FORM No. 626—Defense of non-compliance with contract.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Defendant denies that said work was completed in a good or workmanlike manner, and alleges that said work was deficient in this, that [state in what manner the work was deficient]; and the same was not completed on or before the day limited therefor in the contract set forth in the complaint [or petition], but was then and from thence to the beginning of this action incomplete and unfinished.

[Etc.]

FORM No. 627—Defense of coverture of the defendant.

[Title of court and cause.]

[After introductory part:]

That at the time of the execution of the note, as alleged in the complaint herein, this defendant was, and still is, the wife of one D. E.; that she did not then have, nor has she now, any separate property or business of any nature. [Or, in case she has a separate estate or business, allege that the said supposed contract did not in any way concern such separate property or business.]

[Concluding part.]

FORM No. 628—Defense of breach of contract to feed and care for animals, and cross-complaint for damages.

(In *Calland v. Nichols*, 30 Neb. 532, 534; 46 N. W. 631.)

[Title of court and cause.]

The defendants, for answer and cross-complaint to plaintiff's petition:

1. Admit that on the day of , 1887, , the plaintiff, made and entered into a contract with defendants to take 100 head of cattle or more, not to exceed 200 head, and to keep them in good condition, give them good care and plenty of food, and deliver them to defendants, or order, in the spring of 1888, and at a time when they could live well on grass, for the sum of \$4.50 each, to be paid for in full by the defendants on delivery of the cattle in good condition in the spring of 1888.

2. Aver that on the 7th day of September, 1887, the defendants delivered to the plaintiff, and the plaintiff received from the defendants, 123 head of cattle in good health and condition, to be cared for, properly fed, and delivered to defendants in good condition in the spring of 1888, according to the terms and provisions of said contract.

3. That plaintiff then received said 123 head of cattle upon the above conditions, and undertook to use due and proper care in the management of said cattle, to properly feed, water, and shelter the same, and deliver them in good condition to the defendants at the time therein stated, but the plaintiff, not regarding his promise and undertaking, did not and would not take proper care of said cattle, and did not properly feed, water, or shelter the same; and when he was requested to redeliver the said 123 head of cattle at the time mentioned in said agreement, delivered only 74 of said cattle, and he has failed and neglected to deliver 49 head or any number thereof, and has not paid the value thereof, amounting to the sum of \$980, though often requested so to do; but, on the contrary, the plaintiff so negligently and carelessly conducted himself with respect to said cattle, and took so little care of them, and failed to properly feed, water, and shelter them, that, by and through the said negligence and improper conduct of the plaintiff and his servants in that behalf, the said 123 head of cattle all became poor, thin in flesh, and weak in condition, and 49 head of said cattle, from want of proper food, care, and attention on the part of the plaintiff, and while the same were in his custody, died, to the defendants' damage in the sum of \$980.

4. Defendants further allege that, in order to prevent the whole of said cattle from dying of starvation and exposure, they were compelled to and did incur great expense, to wit, \$199, in furnishing said cattle with proper care and attention while the same were in plaintiff's

iff's possession under the contract aforesaid; that he was under obligation to furnish the same, but failed, neglected, and refused so to do, to defendants' damage in the sum of \$199.

Wherefore, [etc.].

§ 316. JUDGMENT [OR DECREE].

FORM No. 629—For plaintiff.—Damages for breach of contract to purchase.

(In *Central Oil Co. of L. A. v. Southern Refining Co.*, 154 Cal. 165; 97 Pac. 177.)

[Title of court and cause.]

[After recitals as to appearances, hearing, submission, filing of findings, etc.:]

Wherefore, by reason of the law and findings aforesaid, it is ordered, adjudged, and decreed, that the Central Oil Company of Los Angeles, the plaintiff, do have and recover of and from the Southern Refining Company, the defendant, the sum of \$6,500, with interest thereon at the rate of seven per cent per annum from the date hereof until paid, together with the plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$25.50.

Dated October 24, 1906.

G. A. Gibbs,

Judge of Superior Court.

For substance of complaint in action to recover damages for alleged breach of contract of sales, see *Kirchman v. Tuffi Bros.* (Ark.), 122 S. W. 239.

Form of demurrer in an action for breach of contract: *Ford v. Gregson*, 7 Mont. 89, 95, 14 Pac. 659.

Form of answer in an action for the recovery of money paid for the purchase of lots under an agreement to the effect that each member of an association, composed of the plaintiff and the defendants, was to pay two dollars a week, and at drawings, held each week, one of the members was to receive a lot: *Branham v. Stallings*, 21 Colo. 211, 212, 40 Pac. 396, 52 Am. St. Rep. 213.

§ 317. ANNOTATIONS.—Breach of miscellaneous contracts of sale.

1. Basis of contract liability.
2. Complaint for breach of contract of sale.
3. On agreement to furnish laborers.
4. Option agreement.—What complaint must set forth.
- 5, 6. Entire and severable contracts—Distinctions.
7. Test of divisibility of contracts.
- 8, 9. Actions upon instalment contracts.—When judgment is a bar.
10. Defense of non-delivery of contract.
11. Agreement to pursue independent measures of redress.—Defense based upon.

1. **Basis of contract liability.**—Ordinarily, there must be a request from a person authorized to make the same to constitute a basis for contract liability;

but there are some exceptions to this rule, as where a person is under a moral and legal obligation to do an act, and another does it for him under such

circumstances of urgent necessity that humanity and decency admit of no time for delay. In such a case it is sufficient to allege the facts showing the immediate necessity for the services rendered and the impossibility of making a precedent request or promise to pay: *Commissioners of Sheridan County v. Donebrink*, 15 Wyo. 342, 89 Pac. 7, 9, 9 L. R. A. (N. S.) 1234, (against county commissioners to recover for surgical and medical services rendered an indigent person).

2. **Complaint for breach of contract of sale.**—A complaint in an action for damages for breach of an alleged contract has been held sufficient where the material allegations are, in substance: That on the 16th day of October, at Wellsville, Utah, the plaintiffs (appellants) and defendants (respondents) entered into a certain written contract, in words and figures as follows: "Oct. 16, '03. I hereby agree to sell and deliver to Bailey & Sons at their place of business in Logan City, Utah, 125 bushels of lucerne seed at the rate of \$.10½ per pound after same seed is recleaned; said seed to be in said David & Andrew Leishman's sacks. [Signed] Andrew Leishman. David Leishman." That by the terms of said contract the defendants had agreed to deliver the said seed to the plaintiffs at said Logan City within a reasonable time; that ten days or less after the making of said contract was a reasonable time within which to deliver the said seed, and the defendants could have delivered the same to plaintiff within said time had they chosen to do so; that plaintiffs have at all times been able and willing to purchase from defendants said seed at the rate of 10½ cents per pound as expressed in the memorandum of agreement; that plaintiffs at all times had been ready, willing, and able to pay defendants said 10½ cents per pound for said seed upon the delivery and recleaning thereof; that defendants have wholly failed and neglected to deliver said seed or any part thereof to plaintiffs, and have refused to deliver said seed or any part thereof, notwithstanding that the plaintiffs on the 7th day of November, 1903, and at divers certain times prior thereto, demanded of the defendants that they deliver the said seeds in accordance with the terms of the said agreement between the said

parties; that by reason of the failure to deliver said seeds plaintiffs allege that they have been damaged in the sum of \$150, for which they demand judgment, etc.: *Bailey v. Leishman*, 32 Utah 123, 89 Pac. 78, 79, 13 Am. & Eng. Ann. Cas. 1116 (for damages for breach of contract).

3. **On agreement to furnish laborers.**—In an action for damages for breach of a contract against a company for negligently failing to keep its promise, in that it did not furnish experienced laborers in time, and in that it did not properly instruct the laborers actually furnished, the complaint is insufficient where it is impossible to say what, if any, portion of the damages resulted from the fault of the company, and what portion from the fault of the plaintiff himself; and this especially where the complaint is not of the failure of the company to instruct plaintiff's laborers but only of its failure to properly instruct them. It is elementary that in order to maintain an action, the complaint must set forth facts which, if true, put the defendant in the wrong: *Smith v. Billings Sugar Co.*, 37 Mont. 128, 94 Pac. 839, 841, 15 L. R. A. (N. S.) 837, (for damages for breach of contract).

4. **Option agreement.**—What complaint must set forth.—The complaint in an action for damages for a breach of contract to sell under an option agreement should set forth the option, alleging its execution to the plaintiff, with averments that the plaintiff had elected to take the land under the option; the value of the land; the refusal of the defendant to comply with the terms of the option; that the defendant had, before the expiration of the option, sold the land to a third party, or that he had otherwise incapacitated himself from performing the contract on his part; the damages suffered by the plaintiff by reason of the failure and refusal of the plaintiff to comply with the option: *Palmer v. Clark*, 52 Wash. 345, 100 Pac. 749. (The text of this note is not taken from the decision proper; it is rather an adaptation from a preliminary statement by the court.)

5. **Entire and severable contracts.**—As a general rule, it may be said that a contract is entire when by its terms, nature, and purpose it contemplates and intends that each and all of its parts

and the consideration shall be common each to the other and interdependent. On the other hand, it is the general rule that a severable contract is one in its nature and purpose susceptible of division and apportionment. The question whether a given contract is entire or severable is very largely one of intention, which intention is to be determined from the language the parties have used and the subject-matter of the agreement. The divisibility of the subject-matter or the consideration is not necessarily conclusive, though of aid in arriving at the intention. Where it reasonably appears from the language of the contract or from its terms that the parties intended that a full and complete performance should be made with reference to the subject-matter of the contract by one party in consideration of the obligation of the other party the contract is said to be entire. It is very difficult to lay down a rule which will apply to all cases, and consequently each case must depend very largely on the terms of the contract involved: *Pacific Timber Co. v. Windmill Co.*, 135 Iowa 308, 112 N. W. 771, cited in *Quarton v. American Law Book Co.* (Iowa), 121 N. W. 1009, 1015.

6. As to the distinction between an entire and an apportionable contract, see *Hildebrand v. American Fine Arts Co.*, 109 Wis. 171, 85 N. W. 268, 53 L. R. A. 326; *Tilton v. James L. Gates L. Co.*, 140 Wis. 197, 121 Wis. 331, 334.

7. Test of divisibility of contracts.—If a contract contains language which obligates the party to make partial payments, then it is divisible, and an action may be maintained on the instalments as they become due before performance is completed: *La Coursier v. Russell*, 82 Wis. 265, 52 N. W. 176; *Clark v. Clifford*, 25 Wis. 597; *Tilton v. James L. Gates L. Co.*, 140 Wis. 197, 121 N. W. 331, 334.

8. Actions upon instalment contracts.—When payments of money are to be made periodically, separate actions may be maintained in succession for instalments as they mature subject to this provision: All sums due when an action is begun must be included in it: *Puckett v. National Ann. Assn.*, 134 Mo. App. 501, 114 S. W. 1039, 1041; *Union R. Co. v. Traube*, 59 Mo. 355, 362; *Adler v. Railroad*, 92 Mo. 242, 4 S. W. 917; *Kerr v. Simmons*, 9 Mo. App. 376; *Priest v. Deaver*, 22 Mo. App. 276; *Williams v. Kitchen*, 40 Mo. App. 604; *West v. Moser*, 49 Mo. App. 201; *Miller v. Union Switch etc. Co.*, 59 Hun 624, 13 N. Y. Supp. 711; *Lorillard v. Clyde*, 122 N. Y. 41, 45, 25 N. E. 292, 19 Am. St. Rep. 470.

9. If all payments are due, and if one is omitted, a judgment in the case will be a bar to a second action to recover it: *United R. etc. Co. v. Traube*, 59 Mo. 355, 365; *Puckett v. National Ann. Assn.*, 134 Mo. App. 501, 114 S. W. 1039, 1049; *Reformed Dutch Church v. Brown*, 54 Barb. 191.

10. Defense of non-delivery of contract.—Where a defense is based upon non-delivery of a written contract, there should be a denial of execution under it; as the execution of an instrument imports its delivery: *Hart v. Harrison etc. Co.*, 91 Mo. 414, 422, 4 S. W. 123; *North St. Louis etc. Assn. v. Obert*, 169 Mo. 507, 517, 69 S. W. 1044; *American Copying Co. v. Muleski*, 138 Mo. App. 419, 122 S. W. 384, 385.

11. Agreement to pursue independent measures of redress.—Defense based upon.—An agreement by a member of a benevolent or fraternal society to look solely to the society for redress of grievances, is a defense in an action at law brought by a member: *Robinson v. Templar Lodge, I. O. O. F.*, 117 Cal. 370, 49 Pac. 170, 59 Am. St. Rep. 193; *Berlin v. Eureka Lodge K. P.*, 132 Cal. 234, 296, 64 Pac. 254.

CHAPTER LXXXVI.
Work and Services.

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§ 318. COMPLAINTS [OR PETITIONS].

FORM No. 630—For work and services. (Common form.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant is indebted to this plaintiff in the sum of
\$, for work and services rendered by the plaintiff to the defend-
ant, at defendant's instance and request, as a clerk [or otherwise],
between the day of , 19 , and the day of , 19 .

2. That for said services the defendant promised to pay the plaintiff at the rate of \$ per month, amounting in all to \$, [or, that said services were reasonably worth the sum of \$], which became due on the day of , 19 .

3. That the defendant has not paid the same, nor any part thereof.

Wherefore, plaintiff prays judgment against defendant for the sum of \$, and plaintiff's costs of suit.

[Verification.]

A. B., Attorney for plaintiff.

FORM No. 631—To recover balance upon an executed contract for services.

(From Donegan v. Houston, 5 Cal. App. 626; 90 Pac. 1073.)

[Title of court and cause.]

Plaintiff complains of defendants, and alleges:

That within the two years last past, he did grading and excavating for the defendants, for which they agreed to pay him the sum of \$6,173; that the defendants have paid him on account thereof the sum of \$3,938.75; that, although often requested so to do, they have not paid him any further sum thereon; that there is now due and owing the plaintiff from defendants the sum of \$2,234.25, with interest thereon from May 26, 1903.

Wherefore, plaintiff prays judgment against the defendants for the sum of \$2,234.25, and costs of suit.

[Verification.]

Chas. H. McFarland,
Attorney for plaintiff.

FORM No. 632—By employee against employer, for failure to fulfil contract of employment.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , plaintiff and defendant made a contract of employment, the terms of which are as follows:
[Here state the contract made.]

2. That plaintiff entered upon his employment under said contract, and duly performed all the conditions thereof on his part until the defendant refused, as hereinafter mentioned, to permit him to continue further in his employment thereunder; that plaintiff has always been, and is now, ready and willing to perform all the terms, requirements, and conditions of said contract on his part, and has heretofore [repeatedly] offered to perform the same.

Jury's Pl.—80.

3. That the defendant, on the day of , 19 , refused, and has ever since refused, to allow plaintiff to perform the duties and conditions on his part of said contract of employment, and refuses to pay him thereunder or therefor, to plaintiff's damage in the sum of \$.

[Concluding part.]

FORM No. 633—By employer against employee, for damages caused by inefficient services.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , plaintiff and defendant made a contract of employment, the terms of which are as follows: [Here state the contract made.]

2. That to procure plaintiff to make such contract of employment with defendant the defendant stated to plaintiff that defendant was a skilled and careful worker, to wit, a [here state capacity in which the defendant was to serve]; that, confiding in the truth of such representations, plaintiff entered into said contract of employment with defendant, and intrusted to him said work in the capacity of [here state].

3. That the defendant was not a skilled or careful worker, in this: [Here state in what the defendant was inefficient]; that while he was in the employment of plaintiff under said contract defendant so unskilfully [and carelessly] performed said work that he caused injury to the plaintiff in the following respect, to wit: [Here specify damage resulting from said inefficient acts of the defendant], to the damage of plaintiff in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for \$, and plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 634—Against employee, for refusal to serve.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [As in paragraph 1 of preceding form.]

2. That the plaintiff has duly performed all the conditions of said contract on his part to be performed.

3. That the defendant entered upon the plaintiff's service on said day, but afterwards, on the day of , 19 , abandoned said service, and has refused to serve the plaintiff, as aforesaid, [or the defendant wholly refused to enter said service,] to the plaintiff's damage in the sum of \$.

[Concluding part.]

FORM No. 635—By auctioneer, upon an account for work and services.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant is indebted to the plaintiff on an account for work, labor, and services of the plaintiff as [auctioneer, in selling and disposing of, and endeavoring to dispose of, by auction and otherwise, divers goods, chattels, and effects for defendant], performed at the instance and request of the defendant, between the day of , 19 , and the day of , 19 , in the sum of \$, and interest thereon from the day of , 19 .

2. That said sum has not been paid, nor any part thereof.

[Concluding part.]

FORM No. 636—For work, etc., comprising different items.

(Adapted from *Nelson v. Henrichsen*, 31 Utah 191; 87 Pac. 267.)

[Title of court and cause.]

The plaintiff complains of defendant, and alleges:

That between the day of , 19 , and the day of , 19 , plaintiff, at defendant's instance and request, performed work and labor as a miner, in and upon the defendant's mining claims situated at ; that said work upon said claims was performed in the capacity of foreman and manager thereof; that in the course of the plaintiff's said employment, during said time, plaintiff paid moneys for defendant's use and at his request in the management and operation of the said mining claims, amounting to \$; that the labor performed, services rendered, and moneys paid out by the plaintiff at defendant's request, as aforesaid, in the aggregate, amount to and were of the value of \$; that no part of the said sum of \$ has been paid to the plaintiff, except the sum of \$, leaving a balance of \$ due, payable, and unpaid from the defendant to the plaintiff.

Wherefore, the plaintiff prays judgment against the defendant for the sum of \$, and costs of suit.

Knox & Fennemore,
Attorneys for plaintiff.

[Verification.]

FORM No. 637—For services rendered by husband and wife.

(In *Mullenary v. Burton*, 3 Cal. App. 263; 84 Pac. 159.)¹

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That on the 1st day of January, 1889, the defendant employed plaintiff to superintend his Rancho Jesus Maria, situated in Santa Barbara County, state of California, and agreed to pay plaintiff for his services as such superintendent at the rate of \$600 per annum, and to furnish board to plaintiff and his family; that under and by virtue of said contract of employment the plaintiff continued to work for defendant until the 1st day of February, 1895, when said contract of employment was terminated.

2. That the defendant paid to the plaintiff on account of said services the sum of \$1,624, and no more; that there remains due and unpaid from defendant to plaintiff the sum of \$2,026, with interest thereon from the 1st day of February, 1895, at the rate of seven per cent per annum.

For a separate and additional cause of action, the plaintiff alleges:

That for six years next prior to February 1, 1895, plaintiff's wife performed services for the defendant, at his request, by cooking for the servants the defendant had employed on his Rancho Jesus Maria, situated in said county and state, for which services defendant agreed to pay the reasonable value thereof; that the reasonable value of said services was and is \$20 per month; that the defendant has paid neither the whole nor any part of the value of said services, viz, \$1,440, which sum has remained, and now remains, wholly due and unpaid since the 1st day of February, 1895, together with interest thereon at the rate of seven per cent per annum; that the first employment of plaintiff and his wife was continued from the date of

¹ By the answer in the case from the record in which form No. 637 is taken, the defendant pleads the statute of limitations as to a portion of the claims declared upon. The judgment was modified by striking out the amount as to all services to which the bar of the statute was complete, and affirming the judgment as so modified: See *Mullenary v. Burton*, 3 Cal. App. 263, 84 Pac. 159, 160.

its commencement until the date of termination thereof, to wit, the 1st day of February, 1895; that on or about the 5th day of February, 1895, defendant departed from the state of California; that plaintiff is informed and believes, and upon such information and belief alleges, that the defendant has not returned to the state of California, and upon such information and belief further avers that the defendant has been absent from the state of California since the 5th day of February, 1895.

Wherefore, the plaintiff demands judgment against the defendant for the sum of \$3,436, with interest thereon from the 1st day of February, 1895, at the rate of seven per cent per annum, and for costs of suit herein.

[Verification.]

B. F. Thomas,
Attorney for plaintiff.

FORM No. 638—By machinist, for services and materials furnished.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That from the day of , 19 , to the day of , 19 , at , the plaintiff rendered services to the defendant, which said services were performed at the request of the defendant, in repairing the machinery in the mill of the defendant, and for materials and other necessary things furnished by this plaintiff in and about said work, on the like request.

2. That the defendant promised to pay the plaintiff therefor the sum of \$, but he has not paid the same, nor any part thereof.

[Concluding part.]

FORM No. 639—By physician, for services.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant is indebted to the plaintiff in the sum of \$, upon an account for the services of the plaintiff, rendered as a physician for defendant, at his request, between the day of , 19 , and the day of , 19 , in and about the treatment of defendant, and of members of his family, and for divers medicines and other articles provided and administered in that behalf by the plaintiff for defendant, and at his like request, which sum became due and payable from the defendant to the plaintiff on the day of , 19 .

2. That on the day of , 19 , at , payment of the same was duly demanded from the defendant by this plaintiff, but the same has not been paid, nor any part thereof.

[Concluding part.]

FORM No. 640—On builder's contract, with claim for extra work for alterations.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the parties hereto entered into a contract, in writing, a copy of which is hereto annexed, marked "Exhibit A" and made a part hereof, whereby the plaintiff agreed to erect a house for the defendant, in consideration whereof the defendant was to pay \$, as follows: [State terms of payment.]

2. That on the day of , 19 , said contract was altered by mutual consent, as follows: [Set out alterations.]

3. That on the day of , 19 , at the defendant's request, the plaintiff, for a reasonable reward then promised, [here specify the extra work done on each alteration agreed upon, and allege the reasonable value of the same].

4. That in consideration of said alterations the time for completing said building was extended for one month beyond the time fixed by the contract, to wit, to the day of , 19 .

5. That the plaintiff on his part duly performed all the conditions of said contract.

6. That the defendant has not paid the last [two] instalments called for by said contract, nor has he paid the balance due for the extra work aforesaid after deducting the said allowance, amounting in all to \$.

[Concluding part.]

FORM No. 641—By attorneys, for services.

(In Rosenthal v. Ogden, 50 Neb. 218, 220; 69 N. W. 779.)

[Title of court and cause.]

That plaintiffs, A. B. and C. D., are partners, engaged in business as attorneys and counselors at law at , and were such at the times hereinafter mentioned; that about the day of ,

19 , the defendants employed plaintiffs as their attorneys in a matter in controversy between defendants and one ; that from said day of employment until the day of , 19 , the defendants, and each of them, counseled with plaintiffs with reference to said controversy; that on the day of , 19 , applied to one of the judges of the United States circuit court of appeals for an order of injunction and application for receiver against the People's Mammoth Instalment Company, in which suit the defendants herein were joined as defendants; that at the special instance and request of defendants herein, plaintiffs performed all the professional services in and on behalf of said suit, as attorneys for the said and , at Omaha, between the day of , 19 , and the day of , 19 , to wit, [setting out dates]; that said professional services so rendered by plaintiffs were reasonably worth the sum of \$; that said sum of \$ is due for said services, and no part thereof has been paid.

Wherefore [etc.].

A. B. and C. D., Petitioners.

FORM No. 642—By surviving partner of law firm, to recover conditional and reasonable fee for legal services. (Pleading, also, stated account.)

(In *Keegin v. Joyce*, 9 Cal. App. 207; 98 Pac. 396.)

[Title of court.]

| | |
|--|---|
| <p>W. C. Keegin, as surviving partner of the firm of Holcomb & Keegin, plaintiff,</p> <p style="text-align: center;">v.</p> <p>Thomas F. Joyce, defendant.</p> | } |
|--|---|

Plaintiff complains of defendant, and for cause of action alleges:

1. That at all times mentioned in this complaint prior to the 31st day of March, 1903, Curtis W. Holcomb and plaintiff, William C. Keegin, were partners, doing business under the firm name of Holcomb & Keegin, and engaged in the practice of law in the city of Washington, District of Columbia; that both members of said firm were duly admitted to practise in the United States land department and before the secretary of the interior, and in all the offices of the United States having jurisdiction of the disposition of the public lands of the United States; that on the 31st day of March, 1903, the said Curtis W. Holcomb retired from practice, upon an agreement

between himself and plaintiff that plaintiff should complete all of the partnership cases and collect all fees therefor, and account to said Holcomb therefor; that said Holcomb died in the month of May, 1904, and plaintiff is the surviving partner of said partnership.

2. That on or about the 28th day of October, 1901, the defendant retained and employed the said firm of Holcomb & Keegin as his attorneys to prosecute an appeal to the commissioners of the general land office of the United States, from a decision of the register and receiver of the United States land office at Los Angeles, California, adverse to defendant, as to his ownership of the Chandler-Placer mining claim. [Here follows a description of said claim and a statement as to services rendered upon said appeal, and a final decision by the secretary of the interior vacating the decision adverse to the defendant, and reversing the decision of the commissioner of the general land office, etc., as to him, and final decision in said case in favor of this defendant.]

3. That at the time of said employment of said firm of Holcomb & Keegin defendant promised and agreed that he would pay to plaintiff a cash retainer fee of \$250, which should be in full for its services if said case was decided against defendant; and that if said case should be decided in favor of defendant by the secretary of the interior, he, defendant, would pay in addition thereto the reasonable value of said services.

4. That defendant has paid on account of said retainer the sum of \$200, and no more, and has paid nothing upon account of the reasonable value of said services.

5. That the reasonable value of said services so rendered by the firm of Holcomb & Keegin to defendant, including said balance of the retainer fee aforesaid, is \$2,000.

[Pleading cause as a stated account.]

And for another and second cause of action, plaintiff complains and alleges as follows:

1. Plaintiff hereby makes the first paragraph of the first cause of action herein a part hereof, as if the same was fully set forth herein.

2. That on the 6th day of May, 1904, an account was stated between the said firm of Holcomb & Keegin and the defendant, and upon such statement a balance of \$2,000 was found due to said firm from the defendant, which amount defendant agreed to pay.

3. That defendant has not paid the same, nor any part thereof.

Wherefore, plaintiff demands judgment against defendant for the sum of \$2,000, with interest thereon at the rate of seven per cent per annum from the 6th day of May, 1904, and for his costs of suit herein expended.

[Verification.]

J. W. McKinley,
Attorney for plaintiff.

FORM No. 643—By parent, for services of minor child.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant is indebted to the plaintiff in the sum of \$, for work and labor performed for the defendant, at his request, by one M. N., as clerk, in defendant's office at , from the day of , 19 , to the day of , 19 .

2. That said M. N. is the son of the plaintiff, and was, during said period, and still is, under twenty-one years of age.

3. That such services were reasonably worth the sum of \$; that said sum has not been paid, nor any part thereof.

[Concluding part.]

FORM No. 644—Upon individual and assigned claims for services.

(In Greve v. Echo Oil Co., 8 Cal. App. 275; 96 Pac. 904.)

[Title of court and cause.]

Plaintiff, by leave of the court first had and obtained, files this, his amended complaint, and, as a first cause of action against the defendant, alleges:

1. [Allegation as to incorporation of defendant company.]

2. That defendant became indebted to the plaintiff, on account of the balance due on work and services rendered, in the sum of \$388, which said work and services were rendered by plaintiff to defendant, within two years last past, in the county of Fresno, state of California, and at the special instance and request of defendant, and upon its express promise to pay for the same.

3. That the said sum of \$388 has not been paid, nor any part thereof, but the whole amount remains now due, owing, and unpaid from defendant to the plaintiff.

That plaintiff, as and for a second cause of action against defendant, alleges:

1. [Allegation of incorporation of defendant company.]

2. That defendant became indebted to the plaintiff in the sum of

\$60, the same being on account of an amount allowed and agreed to be paid to the plaintiff for the keeping of a team for the use of defendant for the period of three months, to wit, for and during the months of March, April, and May, 1905; that said team was kept and used by plaintiff for the defendant at the special instance and request of defendant, and upon its express promise to pay for the keeping of the same.

3. That said sum of \$60 has not been paid, nor any part or portion thereof, but the whole of said amount remains now due, owing, and unpaid from defendant to the plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of [total of amounts claimed], and for costs of suit, and for such other and further relief as may be proper in the premises.

[Verification.]

Everts & Ewing,
Attorneys for plaintiff.

§ 319. ANSWERS.

FORM No. 645—Defense where damages exceed alleged value of services.—
Action upon assigned claim for reasonable services of a physician.

(In *Coyne v. Baker*, 2 Cal. App. 640; 84 Pac. 269.)¹

[Title of court and cause.]

[After denying specifically the averments of the complaint, that the physician who rendered the alleged services was regularly licensed, etc.; that defendant became indebted to such physician in the sum of \$400, on account of services rendered at the special instance and request of defendant within two years prior to the commencement of the action; that such services were reasonably worth the sum of \$400; and, upon lack of information or belief sufficient to enable defendant to answer, that such claim was assigned to plaintiff, the answer proceeds:]

4. * * * Defendant alleges that the alleged cause of action arose out of an implied contract for the payment of witness fees in

¹ The defense of this action, pleaded by way of answer, although the damages alleged to have been suffered by the defendant exceeded the amount claimed by the plaintiff in his complaint, the court held good; that it was error to strike it out, and that the defendant should have been allowed to prove it. The cross-complaint, setting up substantially the same facts, was also filed, but demurrer thereto was sustained. The court said that "as the defense could be made available by answer, the ruling on the demurrer to the cross-complaint, if erroneous, was immaterial": *Coyne v. Baker*, 2 Cal. App. 640, 84 Pac. 269, 270.

a matter wherein said H. G. Brainard, a physician, appeared as a witness before James H. Blanchard, commissioner, in the city and county of Los Angeles, state of California, on or about the 25th, 26th, and 27th days of June, 1901, wherein, by reason of gross negligence, ignorance, and carelessness in diagnosing the case, said Brainard testified that defendant was insane, or words to that effect, all of which was untrue, and thereby greatly injured and damaged defendant, in an amount greatly in excess of any amount that might otherwise have been due to said Brainard from this defendant, and that, by reason of such gross negligence, ignorance, and carelessness, the testimony of said H. G. Brainard was of no value, but, on the contrary, was of great damage, to this defendant, to wit, more than the sum of \$400; that at the time said purported assignment is alleged to have been made, and by reason of such gross negligence, ignorance, and carelessness, and the damages resulting to defendant as aforesaid, the defendant was not then, or at any time, or at all, indebted to said Brainard or to the plaintiff in said sum, or in any sum whatever.

5. Denies that the sum claimed by plaintiff in his complaint herein, or any portion thereof, is now wholly or at all due or payable from defendant to plaintiff, or to any person, or at all.

Answering the second and further cause of action set forth in plaintiff's complaint, defendant denies as follows, to wit: [Here follow substantially the same allegations as in paragraph 1, to the effect that the said H. G. Brainard is a party in interest in the demand of the plaintiff, and the defendant therefore asks that the said H. G. Brainard be made a party to the suit.]

Wherefore, defendant prays: That said H. G. Brainard be made a party to this suit; that the plaintiff take nothing by this action; that defendant have judgment against plaintiff for his costs of suit; and for such further relief as may be proper.

Will D. Gould,

[Verification.]

Attorney for defendant.

FORM o. 646—Defense of performance.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Alleges that he performed all the work and labor he was to perform in and by virtue of the said contract, and denies that he left unperformed the work, as in the complaint [or petition] alleged, or otherwise, or at all.

[Etc.]

FORM No. 647—Denial of offer to serve.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that he ever at any time offered himself to the defendant to enter into his employment or service.

[Etc.]

FORM No. 648—Defense of special denial, and accounting and payment.

[Title of court and cause.]

The defendant answers the plaintiff's complaint [or petition]:

1. The defendant admits that the plaintiff did, at the request of the defendant, enter into the service of the defendant as stated in the complaint [or petition], but alleges that he did account with said plaintiff on the day of , 19 , at , and that on the said accounting there was found due the plaintiff only the sum of \$.

2. Defendant alleges that after said accounting, to wit, on the day of , 19 , he paid to the plaintiff the said sum of \$, so found due upon said accounting, and the plaintiff received and accepted the same in full satisfaction of said claim.

[Concluding part.]

Form of petition and reply, in an action for salary as president and general manager of a railroad company: *St. Louis etc. R. Co. v. Tiernan*, 37 Kan. 606, 608, 15 Pac. 544, 545.

For a complaint, in an action to recover for injuries received while in the employ of a lumber and logging company, deemed sufficient in charging negligence governing the conduct of the work, see *Lindsay v. Grande Ronde Lumber Co.*, 48 Ore. 480, 87 Pac. 145, 146.

A petition alleging that work is done under a contract made with the duly authorized agent of the defendant, and, further, in the alternative, that the work was done at the solicitation of the said agent and with his knowledge and consent, although obscure, is sufficient to sustain a recovery on a quantum meruit: *Sunderman-Dolson Co. v. Hope* (Tex. Civ. App.), 118 S. W. 216, 217.

CHAPTER LXXXVII.

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§ 320. COMPLAINTS [OR PETITIONS].

FORM No. 649—Action for debt. (Common count.)

(In *Abadie v. Carrillo*, 32 Cal. 172.)

[Title of court and cause.]

The plaintiffs complain of the defendant, and for cause of action
aver:

That on the 11th day of August, 1863, the defendant was indebted
to the plaintiffs in the sum of \$1,004.20 on an account for goods sold

and delivered by the plaintiffs to the defendant, at his request, in the city of Santa Barbara; that no part thereof has been paid; and that there is now due them thereon, from the defendant, the sum of \$1,004.20, with interest thereon from the 11th day of August, 1863.

Wherefore, the plaintiffs pray judgment against the defendant in the sum of \$1,004.20, with interest from the 11th day of August, 1863, and costs.

A. B., Attorney for plaintiff.

[Verification.]

The court in sustaining the pleading in form No. 649, which follows the form of the complaint in *Allen v. Patterson*, 3 Seld. (N. Y.) 476, holds, that inasmuch as this would be a good count in debt at common law, upon authority of cases holding that the ordinary forms of counts in *indebitatus assumpsit*, for goods sold and delivered, etc., are sufficient, the same is good under the code: *Abadie v. Carrillo*, 32 Cal. 172, 175, citing *Freeborn v. Glazier*, 10 Cal. 337, 338; *De Witt v. Porter*, 13 Cal. 171; *Higgins v. Wortell*, 18 Cal. 330, 333; *Wilkins v. Stidger*, 22 Cal. 231, 235, 83 Am. Dec. 64.

FORM No. 650—By partnership, for goods sold and delivered.

(*Magee v. Kast*, 49 Cal. 141.)

[Title of court and cause.]

The plaintiffs, complaining of the defendant, allege:

That plaintiffs are partners in business, under the firm name and style of Magee, Moore & Co.; that on the 17th day of November, 1871, the defendant was, and still is, indebted to the plaintiffs in the sum of \$1,247.50, gold coin, on an account for goods, wares, and merchandise, consisting of leather and shoe manufacturers' goods, sold and delivered by the plaintiffs to the defendant, at his special instance and request, at the city and county of San Francisco; that no part of said sum has been paid; that there is now due to the plaintiffs thereon from the defendant the sum of \$1,247.50, gold coin, with interest thereon from the 17th day of November, 1871, at the rate of per cent per annum.

Wherefore, the plaintiffs pray judgment against the defendant for the sum of \$1,247.50, gold coin, together with interest thereon from the date last aforesaid, and costs of suit.

Holladay & Weeks,

[Verification.]

Attorneys for plaintiff.

FORM No. 651—For reasonable value of goods sold.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff sold and delivered to the defendant, at his request, certain goods and merchandise, to wit: [Briefly describe the same.]

2. That said goods and merchandise were reasonably worth the sum of \$.

3. That the said sum has not been paid, nor any part thereof [except, etc., stating payments, if any].

[Concluding part.]

FORM No. 652—To recover for goods delivered to third person at defendant's request.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , he bargained and sold to the defendant [describe the goods], and at the defendant's request delivered the same to one L. M.

2. That the defendant promised to pay to the plaintiff therefor the sum of \$.

3. [As in paragraph 3, form No. 651.]

[Concluding part.]

FORM No. 653—To recover where credit was given.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff sold and delivered to the defendant [describe the property], for the sum of \$.

2. That the defendant promised to pay therefor to the plaintiff the said sum of \$, on or before the da. of , 19 .

3. [As in paragraph 3, form No. 651.]

[Concluding part.]

FORM No. 654—For balance on goods sold and delivered at an agreed price.
(In *Standard L. Co. v. Miller & V. L. Co.*, 21 Okla. 617; 96 Pac. 761.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. [Allegation of incorporation of plaintiff and defendant corporations.]

2. That during the months of February and March, 1905, plaintiff, at the special instance and request of the defendant, sold and delivered to defendant certain goods, wares, and merchandise at an agreed price of \$900.25, which price was the reasonable market value thereof; that no part of said account has been paid, except the sum of \$698.97; that there now remains due and unpaid on said account the sum of \$296.28, with seven per cent interest thereon from June 7, 1905.

Wherefore [etc.].

FORM No. 655—To recover interest on a balance due on an account stated.

(In *Tootle v. Wells*, 39 Kan. 452; 18 Pac. 692.)

[Title of court and cause.]

1. [Introductory part and averment as to plaintiffs as partners.]

2. That defendant, J. W., at various times between the 1st day of July, 1883, and the 1st day of April, 1884, bought various bills of goods, wares, and merchandise from plaintiffs, and between the 1st day of November, 1883, and the 15th day of September, 1885, made various payments on the same, a full and detailed statement of said purchases and payments being hereto annexed, marked "Exhibit A," and made a part hereof.

3. That it was agreed and understood between plaintiffs and defendant at the time of the receipt by defendant of the invoices of each of said bills of goods and the bills rendered therefor by plaintiffs before the maturity of each of said bills of goods that the amount of each of said bills remaining due and unpaid at the maturity thereof would draw interest from that date at the rate of ten per cent per annum.

4. That the total amount of said interest as above specified from the maturity of each of said bills of goods to the 14th day of September, 1885, upon the balance remaining unpaid at the various times set out in said exhibit A, is \$129.20.

5. That defendant is indebted to plaintiff in the sum of \$129.20 for

interest, as aforesaid, which defendant has refused, and still refuses, to pay, though often requested so to do.

Wherefore, plaintiffs ask judgment against defendant for the sum of \$129.20, with interest thereon from September 14, 1885, and costs of suit.

A. B., Attorney for plaintiff.

FORM No. 656—Against foreign corporation, on an account stated for debt.

(In O'Brien v. Big Casino G. M. Co., 9 Cal. App. 283; 99 Pac. 209.)

[Title of court and cause.]

Plaintiff complains, and alleges:

1. That at all times herein mentioned the above-named defendant, the Big Casino Gold Mining Company, was, and now is, a corporation duly organized and existing under the laws of the state of Washington, and transacting and carrying on business in the county of Tuolumne, state of California.

2. That within the two years immediately preceding the commencement of this action, at the said county of Tuolumne, the defendant became indebted to the plaintiff in the sum of \$500, on an account stated, for services rendered to defendant by plaintiff at the special instance and request of defendant; that no part of said sum of \$500 has ever been paid, and the whole thereof is now owing and unpaid from defendant to plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$500, and costs of suit.

[Verification.]

E. W. Holland,
Attorney for plaintiff.

FORM No. 657—Against husband and wife, for goods sold to wife for her separate estate.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That between the day of , 19 , and the day of , 19 , at , the plaintiff sold and delivered to the defendant W. X., who then was and still is the wife of Y. X., at her request, materials used for the building of a house upon and for the benefit of her separate lands and property.

2. That said materials were of the agreed price and value [or were reasonably worth the sum] of \$.

3. [As in paragraph 3, form No. 651.]

[Concluding part.]

FORM No. 658—By an assignee, for the price of stock and fixtures of a store, payable in instalments.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one L. M. sold and delivered to the defendant the stock and fixtures of the grocery-store at No. Street, in , the property of said L. M., and bargained, sold, and relinquished to the defendant the good-will of the business theretofore carried on by said L. M. there.

2. That the defendant agreed to pay to the said L. M. the sum of \$ therefor in half-yearly payments, on the days of the months of thereafter.

3. [As in paragraph 3, form No. 651.]

4. That thereafter and before the commencement of this action, the said L. M. assigned to this plaintiff the indebtedness of the defendant therefor, of which the defendant was duly notified.

[Concluding part.]

FORM No. 659—On an assigned debt due to a partnership.

(In *Suddarth v. Empire Lime Co.*, 79 Mo. App. 585.)

[Title of court and cause.]

For his cause of action against defendant, plaintiff alleges:

That on the day of January, 1895, the defendant was indebted to plaintiff in the sum of \$456 in this, that in the year 1894, and while the defendant was engaged in the manufacture of lime in the county of Lincoln, state of Missouri, the plaintiff and one P. J. Blair were engaged as partners, under the firm name and style of Suddarth & Blair, in dealing in cordwood in said county of Lincoln; that at said time said firm and the said defendant entered into an agreement whereby said firm agreed to furnish the defendant a large amount of cordwood in said county of Lincoln, for which the defendant agreed to pay said firm the sum of \$1.70 per cord for the amount of wood said firm should furnish; that in pursuance of said agreement said firm did furnish to defendant 108¾ cords of wood on the day of October, 1894, and 159½ cords of wood on the day of November, 1894, all of which wood the defendant received at its works in Lincoln County, Missouri, and promised to pay for at the price per cord aforesaid, in all the sum of \$456; that on the 2d day of January, 1895, said firm demanded payment of said debt, but defend-

ant failed and refused to pay the same or any part thereof, and the same still remains due and unpaid; that afterwards said firm duly assigned its said claim against defendant to plaintiff for value received, and plaintiff is now the owner thereof and entitled to payment.

Wherefore, plaintiff prays judgment for said sum of \$456, with interest thereon from January 2, 1895, and costs of suit.

Wm. A. Dudley, and
Martin & Woolfolk,
Attorneys for plaintiff.

[Verification.]

FORM No. 660—For goods sold and delivered by a corporation to a partnership, and to a partner as an individual.

(In *Redwood City S. Co. v. Whitney*, 153 Cal. 421; 95 Pac. 885.)

[Title of court.]

Redwood City S. Co., a corporation, plaintiff,

v.

Albert H. Whitney and Arthur L. Whitney, copartners, doing business under the name and style of C. E. Whitney & Co., and Arthur L. Whitney, defendants.

Plaintiff complains of the defendants, and for cause of action alleges:

1. [Averment as to incorporation of plaintiff company.]

2. [Averment as to defendants, copartners, etc.]

3. That within two years last past the plaintiff, at the special instance and request of defendants, sold and delivered to defendants goods, wares, and merchandise; that the reasonable value of said goods, wares, and merchandise so sold and delivered was the sum of \$2,410.

4. That the defendants have not paid for said goods, wares, and merchandise, nor any part thereof, nor have they or any of them paid said sum of \$2,410, or any part thereof, though often requested so to do.

Wherefore, plaintiff prays judgment against defendants for the sum of \$2,410, with interest from the date of the commencement of this action at the rate of seven per cent per annum, and for costs of suit.

George C. Ross,
Attorney for plaintiff.

§ 321. ANSWERS.

FORM No. 661—Denial of plaintiff's title.

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition]:

Denies that the goods, wares, or merchandise mentioned therein, or any thereof, were the property of the plaintiff when sold to this defendant; but alleges that the same were then the property of one L. M., who alone, and not the plaintiff, sold the same to this defendant.

FORM No. 662—Defense that credit is unexpired.

[Title of court and cause.]

The defendant alleges that said sale was made upon a credit agreement, whereby the defendant was given the term of months from the day of , 19 , in which to pay for said goods; that said time or credit period had not expired at the commencement of this action.

[Etc.]

FORM No. 663—Defense reducing value [or amount promised], and pleading payment [or offer to pay].

[Title of court and cause.]

[After introductory part:]

Denies that he, defendant, promised to pay the plaintiff the sum of \$ [stating the amount alleged in the complaint], or any greater sum than \$. [Or, Denies that the goods furnished were of the value alleged in the complaint, or of any greater value than \$.]

Defendant alleges that on the day of , 19 , he paid to plaintiff said last-named sum. [Or, That on said date (stating when), and at (stating where), tender of said last-named sum was made to the plaintiff, who then, and ever since has, refused to accept.]

[Concluding part.]

FORM No. 664—Averments in defense as to agreement to take note in part payment.

[Title of court and cause.]

[Introductory part.]

1. That the said goods were sold and delivered to the defendant by the plaintiff upon an agreement, by and between them, that the plaintiff should accept in part payment therefor, to the extent of \$, a promissory note for that sum drawn by this defendant, and dated on the day of , 19 , and payable on the day of , 19 , [with an approved endorser,—if such be a part of the agreement,] and the residue, of \$, to be in cash; that said cash residue was [here allege payment, and the time thereof, or allege offer to pay at a stated time and place, as the case may be].

2. That on the day of , 19 , and before this action was commenced, the defendant tendered to the plaintiff such a note as above described [endorsed by , who was then, and still is, a person of good credit and ability, and a sufficient endorser]; that defendant is still ready and willing to deliver said note and to pay said residue in cash as agreed.

3. That the defendant refused to receive said note, and has refused, and still refuses, to abide by the agreement aforesaid.

[Etc.]

FORM No. 665—Defenses—(1) general denial, (2) former judgment.

(In Reidy v. Scott, 53 Cal. 69.)

[Title of court and cause.]

Now comes the defendant, and answers the complaint of the plaintiffs herein, as follows:

1. Denies every allegation in said complaint as if said allegations were separately set forth herein and specifically and at length denied.

2. For a further and separate defense to this action, defendant alleges that on the 26th day of September, 1876, an action was commenced in the above-entitled court by the above-named plaintiffs against defendant, to recover the amount sued for in this action; that the cause of action set forth in the complaint in said suit is the same as that alleged in the complaint in this action; that thereafter, and before the commencement of this action, to wit, on the 30th day of December, 1876, judgment was duly rendered in said action

against plaintiffs, and in favor of defendant, for the costs thereof; that said judgment has never been appealed from or set aside, or in any manner disturbed.

Wherefore, defendant asks judgment against plaintiffs for his costs.

Bodley & Campbell, Attorneys for defendant.

FORM No. 666—Defenses—(1) denial of account stated, (2) denial of indebtedness.

(In *Stimson M. Co. v. Hughes M. Co.*, 8 Cal. App. 559; 97 Pac. 322.)

[Title of court and cause.]

[After introductory part and denials conformably to this defense, the answer proceeds:]

Defendant denies that plaintiff at any time rendered to defendant an itemized or any bill of the material then delivered, or that on the first or any day of each or any month thereafter, or at all, plaintiff rendered to defendant a full or complete or any account, or referred to the itemized bills previously or at all rendered to defendant, or that said accounts or either of them, or any account alleged to have been rendered, ever became a stated account, or that defendant ever agreed or assented thereto; denies that there is, or ever has been, any stated account between plaintiff and defendant for said material, or that he is indebted to plaintiff in any amount whatsoever; [etc.].

[Concluding part.]

Form of complaint in an action to recover for material and machinery furnished in, about, and for rebuilding a certain flouring-mill: *Gove v. Island City Merc. etc. Co.*, 19 Ore. 363, 24 Pac. 521.

Form of demurrer in an action to recover money alleged to be owing by defendants on an account for goods, wares, and merchandise, sold by plaintiff to defendants: *Howes v. Lynde*, 7 Mont. 545, 548, 19 Pac. 249.

§ 322. ANNOTATIONS.—Actions for debt.—Goods sold and delivered.

1. Action in assumpsit.—Pleading at common law.
- 2, 3. Sufficiency of pleading under the code.
4. Assumpsit lies after part performance.
5. Partner may maintain assumpsit against copartner.
6. Rescission for refusal or neglect to perform.
7. Purchase and sale.—Renunciation of contract.
8. Action by partners on quantum meruit.
9. Variance as to dates of sales, when immaterial.
10. Account stated.—Nature of.
11. Account not mutual.
12. Mistake in account stated, how put in issue.
- 13, 14. Action for balance of account.—Daily balances.
15. Defense of non-delivery.—Under general denial.
16. Reply to counterclaim.

1. ACTION IN ASSUMPSIT.—Pleading at common law.—Under the system of pleading at common law it was requisite that the declaration in action of assumpsit upon executed consideration should show that consideration for promise by defendant was sufficient to support his promise, and it was sufficient to aver that consideration was executed at his request, but this averment was unnecessary when consideration as well as promise was implied from the nature of transaction set forth in the declaration—as in an action for goods sold and delivered to defendant or for money loaned to him by plaintiff: *McFarland v. Holcomb*, 123 Cal. 84, 86, 55 Pac. 761. See *Fisher v. Pyne*, 1 Man. & G. 265, 39 Eng. C. L. 437.

2. Sufficiency of pleading under the code.—It is sufficient under the code to state facts in an action in assumpsit from which a promise to pay will be implied: *National Bank v. Landis*, 34 Mo. App. 433, 440, cited in *Bick v. Clark*, 134 Mo. App. 544, 114 S. W. 1144.

3. Indebitatus assumpsit.—A count in indebitatus assumpsit, framed substantially as required at common law, is now held to be a sufficient compliance with the code mandate as to allegations of fact: *Henry Inv. Co. v. Semonian*, 40 Colo. 269, 90 Pac. 682, citing *Campbell v. Shiland*, 14 Colo. 491, 23 Pac. 324; *Wilcox v. Jamieson*, 20 Colo. 158, 36 Pac. 902.

4. Assumpsit lies after part performance where the entire performance of a special contract has been prevented by one of the parties, or where its terms have been afterwards varied by agreement of both parties: *Reynolds v. Jourdan*, 6 Cal. 108, 111; *Cox v. Western Pac. R. Co.*, 47 Cal. 87, 90; *Cox v. McLaughlin*, 76 Cal. 60, 63, 64, 18 Pac. 100, 9 Am. St. Rep. 164; *Joyce v. White*, 95 Cal. 236, 238, 30 Pac. 524; *Porter v. Arrowhead R. Co.*, 100 Cal. 500, 503, 35 Pac. 146.

5. Partner may maintain assumpsit against copartner for contribution where he pays partnership debt existing after dissolution of partnership; and this is true although he gives his individual note for debt due from the firm: *Sears v. Starbird*, 78 Cal. 225, 231; 20 Pac. 547.

6. Rescission for refusal or neglect to perform.—A refusal or neglect by one party to perform his part of a contract justifies the other in treating the same

as rescinded, and authorizes him to sue generally as in indebitatus assumpsit: *Miller v. Thompson*, 22 Ark. 258, cited in *South Texas Tel. Co. v. Huntington* (Tex. Civ. App.), 121 S. W. 242, 248.

7. PURCHASE AND SALE.—Renunciation of contract.—Mere failure to pay, not evincing a purpose to renounce a contract, is insufficient to justify the seller in treating the contract as abandoned; but if, from all the circumstances, it appears that the buyer intended to renounce and abandon the contract, the seller may then repudiate the same because of its breach by the buyer: *Quarton v. American Law Book Co.* (Iowa), 121 N. W. 1009, 1014; *Monarch Co. v. Wheel Co.*, 105 Fed. 324, 44 C. C. A. 523; *West v. Betchel*, 125 Mich. 144, 84 N. W. 69, 51 L. R. A. 791. (For a review of the cases touching the question of contracts of sale, rights of the seller upon abandonment of the contract by the buyer or upon conditions, and limitation of right of specific performance in reference thereto, see *Quarton v. American Law Book Co.* (Iowa), 121 N. W. 1009, 1016.)

8. Action by partners on quantum meruit.—In an action brought by partners, in their individual names, upon quantum meruit, it is not necessary to allege that the cause of action accrued to them as copartners: *Wilson v. Yegean Bros.*, 38 Mont. 504, 100 Pac. 613, 615. See *Clark v. Wick*, 25 Ore. 446, 36 Pac. 165; *Boosalis v. Stevenson*, 62 Minn. 193, 64 N. W. 380.

9. Variance as to dates of sales, when immaterial.—Where the gist of an action was the sale of material described in an exhibited account, variance as to the date of sales is not fatal where the defendants could not have been misled by the variance and did not claim to have been misled: *C. H. Smith etc. Co. v. Weatherford* (Ark.), 121 S. W. 943, 946.

10. ACCOUNT STATED.—Nature of.—An account stated alters the nature of the original indebtedness, and is in itself in the nature of a new promise or undertaking: *Naylor & Norlin v. Lewiston etc. R. Co.*, 14 Idaho 789, 96 Pac. 573, 578, (to foreclose lien under an account stated); *Hendy v. March*, 75 Cal. 566, 17 Pac. 702; *Carey v. Philadelphia etc. Petroleum Co.*, 33 Cal. 697; *Holmes v. De Camp*, 1 Johns (N. Y.) 36, 3 Am. Dec. 293.

11. An account, not mutual, but one-sided, has been likened to money had and received for one by another. In a sense, definite payments to one for another would constitute an account, each payment being an item; yet the action would essentially be for money had and received. If the payments be made on a transaction, and some of them are older than the period of limitations and others within the period, the aggregate constitutes a single demand. As each successive payment is made, the cause of action is merely enlarged, until the last one, within the period of limitation, would make the total of a single chain, the subject of a single action: *Roberts v. Neale*, 134 Mo. App. 612, 114 S. W. 1121, citing and approving these principles as stated in *Kearns v. Heltman*, 104 N. C. 322, 10 S. E. 467.

12. Mistake in account stated, how put in issue.—An action upon an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of the parties; so where such account stated is assailed upon the ground of mistake, the mistake must be put in issue by the pleadings: *Naylor & Norlin v. Lewiston etc. R. Co.*, 14 Idaho 789, 96 Pac. 573, 578; *Coffee v. Williams*, 103 Cal. 550, 37 Pac. 504; *Auzerais v. Naglee*, 74 Cal. 60, 15 Pac. 371; *Terry v. Sickles*, 13 Cal. 427.

13. Action for balance of account.—The account must be alleged in an action for balance of account, in like

manner as in ordinary actions, and the complaint should specify the nature of the items composing it: *Knowles v. Sandercock*, 107 Cal. 629, 641, 40 Pac. 1047.

14. Daily balances.—An action may be brought for daily balances, as shown by an account: *Santa Rosa Nat. Bank v. Barnett*, 125 Cal. 407, 410, 53 Pac. 85.

15. DEFENSE OF NON-DELIVERY.—Under general denial.—In an action to recover for goods alleged to have been sold and delivered to the defendants, a general denial puts in issue the delivery, and it is not necessary to specifically allege the defense of non-delivery of the goods in order to admit evidence tending to show that the plaintiff had not performed the contract in this respect: *Mette & K. D. Co. v. Lowrey*, 39 Mont. 124, 101 Pac. 966, 969.

16. Reply to counterclaim.—Under a complaint for goods sold and delivered at an agreed price, and where the defendant, as a basis for its counterclaim, pleaded that said contract was such as to require further deliveries, which the plaintiff failed to make; held, that the reply of the plaintiff to this counterclaim should have pleaded a modification of this contract sufficient to excuse the plaintiff from further deliveries. The general denial of the plaintiff to the counterclaim puts in issue the existence of the contract as pleaded by the defendant: *Brooklyn Creamery Co. v. Friday*, 137 Wis. 461, 119 N. W. 126, 127.

CHAPTER LXXXVIII.

Money Had and Received.—Involuntary Trusts.

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§ 323. COMPLAINTS [OR PETITIONS].

FORM No. 667—For money had and received. (Common form.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant received from one E. F. the sum of \$, to and for the use of the plaintiff.

2. That on the day of , 19 , and before the commencement of this action, the plaintiff demanded payment thereof from the defendant.

3. [As in paragraph 3, form No. 651.]

[Concluding part.]

FORM No. 668—On assigned claim for money had and received, etc.—Statement of cause in separate counts.

(In *Miller v. Abrahamson*, 9 Cal. App. 396; 99 Pac. 534.)

[Title of court and cause.]

Plaintiff complains, and alleges:

1. That defendant is indebted to plaintiff in the sum of \$622.10, for money had and received by defendant to and for the use of the plaintiff and L. P. Laursen within two years last past.

2. That no part of said sum has ever been paid, although demand therefor has often been made.

3. That prior to the bringing of this action the said L. P. Laursen assigned and transferred all his interest in said claim against defendant to plaintiff herein, and plaintiff is now the lawful owner and holder thereof.

And for a further and second count against defendant, plaintiff alleges:

1. That plaintiff is now, and for more than one year last past has been, a contractor, engaged, together with L. P. Laursen, in the city of Los Angeles, in the business of building houses, and that during said time defendant has had various subcontracts from plaintiff and Laursen for doing certain brickwork for plaintiff and Laursen; that plaintiff was accustomed to and did pay the defendant from time to time various sums of money upon orders or requests therefor made by defendant upon plaintiff and Laursen; and that the total amount paid by plaintiff to defendant on such orders and re-

quests of defendant, as aforesaid, since the 2d day of July, 1906, has aggregated the sum of \$17,625.10.

3. That the total amount due from plaintiff and Laursen to defendant for all of said subcontracts hereinbefore referred to, since and including the 2d day of July, 1906, has been and now is the sum of \$17,003, and no further or other sum whatsoever, and that the balance now due from defendant to plaintiff, by reason of such overpayment, and by reason of the assignment hereinafter alleged, is the sum of \$622.10.

5. [Averment of assignment as in paragraph 3, first count.]

Wherefore, plaintiff prays judgment against defendant for said sum of \$622, and costs of suit.

[Verification.]

Avery & French,
Attorneys for plaintiff.

FORM No. 669—For recovery back of a wager.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff deposited in the hands of the defendant, as stakeholder, the sum of \$, which was to abide the event of a wager entered into between the plaintiff and one L. M., on the result of [a horse race, or game of chance, specifying] then about to take place.

2. That such wager was in violation of the statute entitled [set out title], passed , and acts amending the same and supplementary thereto.

3. That the result of said [horse race, etc.] yet remains undetermined, and the defendant still retains said money as stakeholder.

4. That on the day of , 19 , the plaintiff demanded the return of said money of the defendant; that said sum has not, nor has any part thereof, been returned or paid back.

[Concluding part.]

FORM No. 670—To recover specific moneys lost by a servant in gambling.

(In *Ramirez v. Main*, 11 Ariz. 43; 89 Pac. 508.)¹

[Title of court and cause.]

Plaintiff complains of defendant, and alleges:

That on the 20th day of July, 1903, in the said county of Santa Cruz, one Jesus Mendoza, being then and there the servant of and in

¹ The complaint, substantially as given above, was sustained as against a general demurrer: *Ramirez v. Main*, 11 Ariz. 43, 89 Pac. 508, 509.

the employ of this plaintiff, had in his possession, and intrusted to him by this plaintiff, as such servant and agent, a certain sum of money, to wit, the sum of \$6,000, in money of the republic of Mexico, the same being the property of this plaintiff, and being intrusted to the said Jesus Mendoza, as aforesaid, for the specific purpose of safely carrying and conveying the same from the bank of Sonora to the office or place of business of this plaintiff, and to be delivered to this plaintiff for his use and benefit; that the said Jesus Mendoza, without the knowledge or consent of the plaintiff, and in violation of his trust as such servant or employee, did, at the date and in the county aforesaid, engage in a gambling game with one Frank M. Main, the defendant herein, and thereupon did lose and cast to the possession of the said Frank M. Main, the sum of \$5,950, money of the republic of Mexico, as aforesaid, the same being of the said money of the said C. Ramirez the plaintiff herein, intrusted to the said Jesus Mendoza, as aforesaid; that the said Frank M. Main has and holds the said sum of \$5,950, money of the republic of Mexico, as aforesaid, the property of this plaintiff, without consideration, and without legal or equitable title; that the said defendant is indebted to this plaintiff in the said sum of \$5,950, money of the republic of Mexico, as aforesaid, all and every part of which is due from the said defendant to this plaintiff; that on said 20th day of July, 1903, one dollar of the money of the republic of Mexico was of the value of forty-three cents of the money of the United States of America, and that the said sum of \$5,950, of money of the republic of Mexico, was on the said 20th day of July, 1903, of the value of \$2,558.50, in lawful money of the United States of America; that plaintiff has demanded the said sum of money so due, but that defendant has not paid the same, nor any part thereof.

Wherefore, the plaintiff prays judgment against the defendant for the sum of \$5,950, money of the republic of Mexico, or its value, at the date of its loss, in lawful money of the United States, to wit, the sum of \$2,558.50, in lawful money of the United States; and for such other and further relief as may be brought in the premises, and for costs of this action.

A. B., Attorney for plaintiff.

[Verification.]

§ 324. ANSWERS.**FORM No. 671—Denial of receipt of moneys.**

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:
Denies that he ever received the money mentioned in the complaint
[or petition], or any part thereof.
[Etc.]

FORM No. 672—Defense of accounting and payment.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:
Alleges that on the day of , 19 , at , he
accounted with and paid over to the plaintiff all moneys received by
him, defendant, up to that day.
[Etc.]

§ 325. ANNOTATIONS.—Money had and received.—Involuntary trusts.

- 1, 2. Allegation that moneys were received "to or for the use of plaintiff" essential.
3. When action for money had will lie.
4. Privity of contract not necessary.
5. Common-law count for money had and received not sufficient averment for cause of action for fraud.
6. Moneys held by an agent.
- 7-10. Moneys paid by mistake.—Promise not necessary to allege.
11. Pleading in action for usury.
12. Common-law remedy of offset or counterclaim.

1. Allegation that moneys were received "to or for the use of plaintiff" essential.—A count in a complaint alleging, "that within the two years next last past, and at the city and county of San Francisco, state of California, the defendants became indebted to Fox-Ballantyne Co., in the sum of \$55, money had and received by defendants from said Fox-Ballantyne Co., at the special instance and request of defendants," is an insufficient statement of a cause of action, there being no allegation, either directly or by implication, that the money was had or received for the use of plaintiff or his assignors. A general demurrer thereto is properly sustained: *Fox v. Monahan*, 8 Cal. App. 707, 97 Pac. 765.

2. The approved and usual form for the count of money had and received is very simple, consisting merely in stating that the defendant is indebted to the

plaintiff in a certain sum "for money had and received by the defendant to and for the use of the plaintiff": *Fox v. Monahan*, 8 Cal. App. 707, 97 Pac. 765.

3. When action for money had will lie.—The action for money had and received will lie wherever it appears that defendant has received money which in equity and good conscience he should pay to the plaintiff. Under this principle, a complaint which alleges that the money was plaintiff's assignor's, as his commission from the sale of certain real property, and was collected by defendants and appropriated to their own use, is good as against a general demurrer: *Fox v. Monahan*, 8 Cal. App. 707, 97 Pac. 765.

4. No privity of contract is necessary to sustain the action for money had and received; for the law, under circumstances where money is held by a person which in equity and good conscience

belongs and should be paid to another, implies a promise to pay. It is of no importance how the money came into the holder's hands if the other party is legally entitled to it: *Stoakes v. Larson*, 108 Minn. 234, 121 N. W. 1112, 1114.

5. Common-law count for money had and received not sufficient averment for cause of action for fraud.—Where the complaint in an action alleges that on the 24th day of April, 1907, the defendants received the sum of \$3,000 from the plaintiffs "to and for the use of the plaintiffs," which sum, after demand, the defendants have refused to repay, and where the answer is a general denial, it has been held, in a recently well-considered case in Montana, that testimony designed to show fraud is not admissible under the pleadings, for the reason that the facts relied upon to show fraud were not set forth in the complaint. The court says that "a complaint fashioned after a common-law count, may or may not state facts sufficient to constitute a cause of action under the code. In this state there is no action for money had and received as such; and there is no common law in any case where the law is not declared by the code (§ 860, Rev. Codes). The common counts have been superseded by our system of code pleading. A complaint, under this latter system, must contain a statement of the facts constituting a cause of action in ordinary and concise language (§ 6532, Rev. Codes). If the phraseology of any common count is adequate, in any particular case, to bring the pleader within the code rule, then his pleading is sufficient; otherwise, it is not. When a pleader elects to employ the language of a common count, he subjects himself to the rules governing the construction and sufficiency of complaints under the codes; that is to say, if a common count will in fact state his cause of action in ordinary and concise language, it is good. If it will not, it is bad": *Truro v. Passmore*, 38 Mont. 544, 100 Pac. 966, 968.

6. Moneys held by an agent.—Under circumstances where an agent becomes possessed of moneys, a portion of which belongs to him and a portion to his principal, an action for money had and received will lie, on the principle that one man shall not withhold that which rightfully belongs to another: *Jenkins v. Clopton* (Mo. App.), 121 S. W. 759, 765;

Crigler v. Duncan, 121 Mo. App. 381, 392, 99 S. W. 61; *Winningham v. Fancher*, 52 Mo. App. 458; *Mansur v. Botts*, 80 Mo. 651; *Cary v. Curtis*, 3 How. (44 U. S.) 236, 11 L. ed. 576; *Chesapeake etc. Canal Co. v. Knapp*, 9 Pet. (34 U. S.) 541, 564, 565, 9 L. ed. 222.

7. The right to recover money paid by mistake is in no manner dependent upon an express admission by the party receiving it, or on his agreement to refund: *Fidelity Savings Bank v. Reeder*, 142 Iowa 373, 120 N. W. 1029, 1030, citing *Boyer v. Pack*, 2 Denio (N. Y.) 107; *Baltimore etc. R. Co. v. Faunce*, 6 Gill. (Md.) 68, 46 Am. Dec. 655; *Worley v. Moore*, 97 Ind. 15; *Clark v. Sylvester* (Me.) 13 Atl. 404; *Johnson v. Saum*, 123 Iowa 145, 98 N. W. 599; *Holmes v. Lucas Co.*, 53 Iowa 211, 4 N. W. 918; *Hoffmann v. Cockrell*, 112 Iowa 141, 88 N. W. 898; *Iowa State Bank v. Cereal etc. Brokerage Co.*, 132 Iowa 248, 109 N. W. 719.

8. Promise, when not necessary to allege.—An allegation of an express admission by the party receiving money paid by mistake, made after the discovery of the mistake, and accompanied by a promise to correct it, is not necessary; nor is it necessary to allege such promise in a complaint in an action to recover the money so paid: *Fidelity Savings Bank v. Reeder*, 142 Iowa 373, 120 N. W. 1029, 1030, (construing Iowa code § 3639).

9. Money paid through a mistake of fact may be recovered in an action for that purpose: *American Brewing Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129, 2 Am. & Eng. Ann. Cas. 821.

10. The rule that moneys paid through a mistake of fact may be recovered is subject to the qualification that the party paying must make the payment under a bona fide belief that the money is due: *American Brewing Co. v. St. Louis*, 187 Mo. 367, 86 S. W. 129, 2 Am. & Eng. Ann. Cas. 821.

11. Pleading in action for usury.—A complaint in an action for the recovery of money paid as usury is not required to allege expressly that the usury was knowingly paid and accepted, where the objection is not raised by demurrer, but upon objection to the admission of evidence thereunder. In such case the authorities favor a liberal construction of the pleadings: *Waldner v. Bowden State Bank*, 13 N. Dak. 604, 102 N. W. 169, 3 Am. & Eng.

Ann. Cas. 847. See Stutsman County v. Mansfield, 5 Dak. 78, 37 N. W. 304; Commonwealth etc. Co. v. Dokko, 71 Minn. 533, 74 N. W. 891; Peterson v. Hopewell, 55 Neb. 670, 76 N. W. 451; Whitbeck v. Sees, 10 S. Dak. 417, 73 N. W. 915.

12. The common-law remedy of offset or counterclaim for money had and received will not lie to recover usurious interest where the right to recover is given by statute which defines the nature of the action and provides for a penalty: *McCarty v. First National Bank*

(S. Dak.), 121 N. W. 853, 855, (construing U. S. Rev. Stats. § 5197,) citing *Schuyler Nat. Bank v. Gadsden*, 191 U. S. 451, 24 Sup. Ct. 129, 48 L. ed. 258; *Hasseltine v. Central Nat. Bank*, 183 U. S. 132, 22 Sup. Ct. 50, 46 L. ed. 118; *Driesbach v. Wilkesbarre Nat. Bank*, 104 U. S. 52, 26 L. ed. 658; *Barnet v. Nat. Bank*, 98 U. S. 555, 25 L. ed. 212; *Farmers etc. Bank v. Dering*, 91 U. S. 29, 23 L. ed. 196; *Walsh v. Mayer*, 111 U. S. 31, 4 Sup. Ct. 260, 28 L. ed. 338; *Stephens v. Monongahela Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 28 L. ed. 399.

CHAPTER LXXXIX.

Money Lent.

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§ 326. COMPLAINTS [OR PETITIONS].

FORM No. 673—For money lent. (Common form.)

[Title of court and cause.]
The plaintiff complains of the defendant, and alleges:
1. That on the day of , 19 , at , the plaintiff lent to the defendant, at his request, \$, which the defendant promised to repay, with interest, on demand [or on a day named].
2. That on the day of , 19 , the plaintiff duly demanded payment of the same from the defendant, but said sum has not been paid, nor any part thereof.
[Concluding part.]

FORM No. 674—By assignee of lender against borrower.

[Title of court and cause.]
The plaintiff complains of the defendant, and alleges:
1. That on the day of , 19 , at , the defendant was indebted to one L. M. in the sum of \$, on an account for money lent by said L. M. to the defendant.

2. That on the day of , 19 , at , the said L. M. assigned said indebtedness to the plaintiff, of which assignment the defendant had due notice.

3. That said sum has not been paid, nor any part thereof.
[Concluding part.]

§ 327. ANSWERS.

FORM No. 675—Denial of loan.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that the plaintiff lent him the money mentioned in the complaint [or petition], or any part thereof.

[Etc.]

FORM No. 676—Defense that money was paid in settlement of an antecedent debt.

[Title of court and cause.]

[After introductory part:]

Defendant alleges that said sum of \$, alleged in the complaint [or petition] to have been loaned to defendant by the plaintiff, was paid by plaintiff to defendant in the settlement of a debt at the time of said payment owing to defendant from the plaintiff upon an account [or other obligation, specifying].

[Concluding part.]

Action to recover moneys loaned, consisting of trust funds and other amounts: For substance of the petition upon which judgment was affirmed for the plaintiff, see *Pullis v. Somerville*, 218 Mo. 624, 117 S. W. 736, 737.

In an action at law to recover moneys alleged to have been collected by the defendant for the account of the plaintiff, it is not necessary to allege that the money loaned was in fact the money of the defendant, or that the cashier of the defendant was merely a nominal party whose name was made use of as a means or excuse for an attempt to exact a so-called commission. These questions are matters of evidence which the pleader is neither required nor permitted to plead: *Leasure v. Boie*, 142 Iowa 284, 120 N. W. 643, 644.

3. That in fact said account was not correctly stated, but, on the contrary, it overcharged the plaintiff with the sum of \$, by [setting out the error].

4. [Same as paragraph 3, form No. 677.]
[Concluding part.]

FORM No. 679—By bank, to recover attorney's fees and expenses incurred against a party who fraudulently obtained a draft.

(In *Bank v. Williams*, 62 Kan. 431; 63 Pac. 744.)

[Title of court and cause.]

[After introductory part:]

1. That defendant, for the purpose of wronging, cheating, and defrauding said bank, made and delivered to it a check drawn on the Citizens' Bank of , in the amount of \$, and bought of and received from plaintiff a draft on New York for said sum, payable to his own order; that, to carry out his fraudulent purpose, defendant represented that he had on deposit in the Citizens' Bank a sum equal to the amount of the check.

2. That said check was worthless; that on discovering this fact plaintiff, by telegraph, stopped payment on the New York draft; that defendant immediately left the state, and thereafter procured said draft to be cashed at , by M. & Sons, at that place; that M. & Sons were innocent purchasers of said draft, and that plaintiff was liable thereon to M. & Sons for the amount of said draft; that in order to protect itself against loss it became necessary for plaintiff to counsel and advise with attorneys, and employ a lawyer to go to and procure a settlement of said draft by defendant with M. & Sons, by returning to them, said M. & Sons, said money paid to him, said , by M. & Sons, on said draft, which was finally done; that in procuring the settlement of said draft to the extent aforesaid, and repayment of the money to M. & Sons, plaintiff was put to large expense, to wit, for telegraphing, attorney's fees, and other expenses, in all the sum of \$; that all of said costs and expenses were caused by and through the wrongful, fraudulent, and felonious acts of the defendant in giving said worthless check and representing the same to be valid and good, and said amount is the fair and reasonable value thereof; that defendant has now in his possession said original draft drawn on the National Bank of North America, and refuses to deliver the same to plaintiff.

Wherefore, plaintiff prays that said draft be canceled and surrendered to plaintiff, and for \$ damages [etc.].

FORM No. 680—By landlord against tenant, for repayment of tax.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff and the defendant entered into an agreement, by which the defendant hired of the plaintiff a house in the village of , and further agreed [etc., reciting stipulation to pay tax].

2. That there was duly levied and assessed upon the said premises for the year 19 , and while the covenants of the aforesaid agreement were in full force, and the defendant was in possession of the premises by virtue thereof, a tax of \$, which the defendant neglected to pay.

3. That by reason thereof the plaintiff was, on the day of , 19 , compelled to pay the said sum of \$, with \$ arrearages of interest, at per cent, amounting in the whole to the sum of \$.

4. That said sum has not been repaid, nor any part thereof.
[Concluding part.]

FORM No. 681—By endorser who has paid part of note.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant, for value received, made and delivered to the plaintiff his promissory note for \$, payable to the plaintiff's order in days after said date.

2. That before the maturity of said note the plaintiff endorsed and negotiated the same for value.

3. That at maturity the said note was duly presented to the defendant for payment [or allege excuse for non-presentment], but was not paid, of all of which the plaintiff had due notice, and was on the day of , 19 , compelled to pay, and did pay, to one O. P., the holder of said note, the sum of \$, being the amount due thereon from the defendant.

4. That said sum has not been repaid nor any part thereof.
[Concluding part.]

FORM No. 682—By maker of accommodation note who has paid the same.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff made and delivered to the defendant his promissory note, in the sum of \$, payable to the defendant's order in days after said date.

2. That the plaintiff never received any consideration for said note, but the same was an accommodation note, given to the defendant at his request, and on his promise to pay the same at maturity.

3. That as the plaintiff is informed and believes, and therefore alleges, the defendant thereafter, and before its maturity, negotiated said note for value.

4. That the defendant did not pay said note at maturity, in consequence whereof the plaintiff was compelled to and did, on the day of , 19 , pay the sum of \$ in satisfaction thereof.

5. That said sum has not been repaid, nor any part thereof.

[Concluding part.]

FORM No. 683—For repayment of money after judgment reversed.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , judgment was duly given, made, and rendered against this plaintiff in the court of the county of , in an action wherein the defendant was plaintiff, and this plaintiff was defendant, for the sum of \$.

2. That on the day of , 19 , the plaintiff was compelled to pay, and did pay, to the defendant \$, in satisfaction of the said judgment.

3. That afterwards, on the day of , 19 , by the judgment of said court [or other appellate court], duly given and made, the said first-mentioned judgment was duly reversed.

4. [Same as paragraph 3, form No. 677.]

[Concluding part.]

CHAPTER XCI.

Hiring of Personal Property.

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§ 329. COMPLAINTS [OR PETITIONS].

FORM No. 684—For hire of personal property.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That between the day of , 19 , and the day of , 19 , the defendant hired from the plaintiff [horses, carriages, etc.], for which he promised to pay the plaintiff, on account thereof, the sum of \$, on the day of , 19 .

2. That said sum has not been paid, nor any part thereof.

[Concluding part.]

FORM No. 685—Hire of furniture, with damages for ill-usage.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

For a first cause of action:

1. That on the day of , 19 , at , the defendant hired from the plaintiff [state what], the property of the plaintiff, for months then next ensuing, for the use of which he promised to pay at the rate of \$ per month, and agreed to return the same in good condition to the plaintiff at the expiration of said time, reasonable wear and tear excepted.

2. That said amount has not been paid, nor any part thereof.

For a second cause of action: .

1. That the value of the property so hired by the defendant as aforesaid was \$.

2. That the defendant did not use said property in a reasonable manner, nor take due care of the same; that by his negligence and ill-use the same has become defaced and injured beyond the reasonable wear and tear thereof, and was returned to the plaintiff in said damaged condition, to the plaintiff's further damage in the sum of \$.

3. [Same as paragraph 2, preceding form.]

[Concluding part.]

FORM No. 686—For hire of piano-forte.

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That on the day of , 19 , at , the defendant hired from the plaintiff one piano-forte, the property of the plaintiff, for the term of months then next ensuing, to be returned to this plaintiff at the expiration of said time in good condition, reasonable wear excepted; that for the use of the same, defendant promised to pay plaintiff a reasonable sum [or state an amount agreed upon].
2. That \$ is a reasonable sum for the hire of the same, which sum, on the day of , 19 , became due from the defendant to the plaintiff.
3. [Same as paragraph 2, form No. 684.]
- [Concluding part.]

CHAPTER XCII.

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§ 330. CODE PROVISIONS.

Innkeeper's liability.

California, § 1859. The liability of an innkeeper, hotelkeeper, boarding-house and lodging-house keeper, for losses of or injuries to personal property, other than money, placed by his guests, boarders, or lodgers under his care, is that of a depositary for hire; provided, however, that in no case shall such liability exceed the sum

of one hundred dollars for each trunk and its contents, fifty dollars for each valise or traveling-bag and contents, and ten dollars for each box, bundle, or package and contents, so placed under his care, unless he shall have consented in writing with the owner thereof to assume a greater liability. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown;

^a Arizona, Rev. Stats. 1901, § 2919. ^b Colorado, Rev. Stats. 1908, §§ 3011, 3014. ^c Iowa, Ann. Codes 1897, § 3138. ^d Missouri, Ann. Stats. 1906, § 7579. ^e Montana, Rev. Codes 1907, § 5164. ^f Nebraska, Comp. Stats. Ann. 1909, § 2766; Ann. Stats. (Cobbey), § 6390. ^g North Dakota, Rev. Codes 1905, § 5476. ^h Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2853; Comp. Laws 1909 (Snyder), § 3014. ⁱ South Dakota, Rev. Codes 1903, C. C. § 1381. ^j Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 1726.

^a Arizona, § 2919. An innkeeper is liable for all losses of, or injuries to, personal property placed or left by his guests under his care; unless occasioned by an irresistible, superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn.

^{b1} Colorado, § 3011. The landlord or keeper of any hotel or public inn shall not be liable for the loss of any article or articles left by any guest or patron in any room or rooms assigned to or occupied by such guest or patron, in any event, greater than the sum of two hundred (200) dollars for all articles which may be lost by said guest or patron, except by an agreement in writing made by the landlord or keeper of such hotel or public inn, or person in charge of the office, assuming a greater liability.

^{b2} Colorado, § 3014. None of the provisions of this act shall be construed so as in any event to render the landlord or keeper of a hotel or public inn in this state liable in a greater sum than the actual loss or damage sustained.

^c Iowa, § 3138. Keepers of hotels, inns and eating-houses and steamboat owners, who shall provide and keep therein a good and sufficient vault or safe for the deposit of money, jewels and other valuables, and shall provide a safe and commodious place for the baggage, clothing and other property belonging to their guests and patrons, and keep posted up in a conspicuous place in the office or other public room, and in the guests' apartments therein, printed no-

tices, stating that such places for safe deposit are provided for the use and accommodation of the inmates thereof, shall not be liable for the loss of any money, jewels, valuables, baggage or other property not deposited with them, unless such loss shall occur through the fault or negligence of such landlord or keeper, or steamboat owner, his agent, servant or employee, but nothing herein contained shall apply to such reasonable amount of money, nor to such jewels, baggage, valuables or other property as is usual, fit and proper for any such guests to have and retain in their apartments or about their persons. Hotel, inn, rooming-house or eating-house keepers shall have a lien upon, and may take and retain possession of, all baggage and other property belonging to or under the control of their guests or patrons, which may be in such hotel, inn, rooming-house or eating-house, for the value of their accommodations and keep, and for all money paid for or advanced to, and for such extras and other things as shall be furnished, such guest or patron, and such property so retained shall not be exempt from attachment or execution to the amount of the reasonable charges of such hotel, inn, rooming-house or eating-house keeper, against such guest or patron, and the costs of enforcing the lien thereon. (Sup. 1907 as amended Mch. 12, 1909, Laws 1909, p. 185.)

^d Missouri, § 7579. No innkeeper in this state shall be liable for the loss of any baggage or other property of a

guest, caused by fire not intentionally produced by the innkeeper or his servants, nor shall he be liable for the loss of any merchandise for sale or sample belonging to a guest, unless the guest shall have given written notice of having such merchandise for sale or sample in his possession after entering the inn, nor shall the innkeeper be compelled to receive such guest with merchandise for sale or sample; but innkeepers shall be liable for the losses of their guests, caused by the theft of such innkeeper or his servants, anything herein to the contrary notwithstanding.

• Montana, § 5164, substantially same as Arizona § 2919, except in line 3, after "placed" omit "or left" before "by his guests."

† Nebraska, § 3766. The liability of the keeper of any inn or hotel, whether individual, partnership, or corporation, for loss of or injury to personal property placed by his guests under his care, other than that described in the preceding section, shall be that of a depositary for hire; provided, however, that in no case shall such liability exceed the sum of one hundred and fifty dollars for each trunk and its contents, fifty dollars for each valise and its contents, and ten dollars for each box, bundle, or package, and contents, so placed under his care, all other miscellaneous effects including wearing apparel and personal belongings, fifty dollars, unless he shall have consented in writing with such guest to assume a greater liability. And provided further whenever any person shall suffer his baggage or property to remain in any inn or hotel, after leaving the same as a guest, and after the relation of innkeeper and guest between such guest and the proprietor of such inn or hotel has ceased, or shall forward the

same to such inn or hotel before becoming a guest thereof and the same shall be received into such inn or hotel such innkeeper may at his option hold such baggage or property at the risk of such owner.

g North Dakota, § 5476, substantially same as Montana § 5164, except, at the opening after "innkeeper" insert "or keeper of a boarding house" before "is liable"; also in line 2 after "guests" insert "or boarders"; also at the end after "inn" add "or boarding-house."

h Oklahoma, § 2853. Any innkeeper or keeper of a boarding-house is liable for all losses of, or injuries to, personal property placed by his guests or boarders under his care, unless occasioned by an irresistible superhuman cause, by a public enemy, by the negligence of the owner, or by the act of some one whom he brought into the inn or boarding-house, and upon such property the innkeeper or keeper of a boarding-house has a lien and a right of detention for the payment of such amount as may be due him for lodging, fare, boarding, or other necessities by such guest or boarder; and the said lien may be enforced by a sale of the property in the manner prescribed for the sale of pledged property.

i South Dakota, C. C. § 1381, substantially same as Oklahoma § 2853, except at the end after "property" add "or by the Code of Civil Procedure."

j Wisconsin, § 1726. No innkeeper shall be liable for the loss of any baggage or other property of his guest caused by fire, not intentional, produced by the innkeeper or any of his servants; but every innkeeper shall be liable for any loss of any guest in his inn caused by theft or gross negligence of such innkeeper or any of his servants.

Limiting of liability.

California, § 1860. If an innkeeper, hotelkeeper, boarding-house or lodging-house keeper, keeps a fire-proof safe, and gives notice to a guest, boarder, or lodger, either personally or by putting up a printed notice in a prominent place in the office or the room occupied by the guest, boarder, or lodger, that he keeps such a safe and will not be liable for money, jewelry, documents, or other articles of unusual value and small compass, unless placed therein, he is not

liable, except so far as his own acts shall contribute thereto, for any loss of or injury to such articles, if not deposited with him to be placed therein, nor in any case more than the sum of two hundred and fifty dollars for any or all such property of any individual guest, boarder, or lodger, unless he shall have given a receipt in writing therefor to such guest, boarder, or lodger. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Arizona, Rev. Stats. 1901, § 2920. ^b Colorado, Rev. Stats. 1908, C. C. P. § 3007. ^c Iowa, Ann. Code 1897, § 8138. ^d Minnesota, Rev. Laws 1905, § 2810. ^e Missouri, Ann. Stats. 1906, § 7578. ^f Montana, Rev. Codes 1907, § 5165. ^g Nebraska, Comp. Stats. Ann. 1909, §§ 3764, 3765; Ann. Stats. (Cobbey), §§ 6388, 6389. ^h North Dakota, Rev. Codes 1905, § 5477. ⁱ Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2854; Comp. Laws 1909 (Snyder), § 3015. ^j South Dakota, Rev. Codes 1903, C. C. § 1383. ^k Washington, Code 1910 (Rem. & Bal.), § 1203. ^l Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 1725. ^m Wyoming, Rev. Stats. 1899, § 2514.

^a Arizona, § 2920. If an innkeeper keeps a fire-proof safe, and gives notice to a guest, either personally or by putting up a printed notice in a prominent place in the room occupied by the guest, that he keeps such a safe and will not be liable for money, jewelry, documents or other articles of unusual value and of small compass, unless placed therein, he is not liable, except so far as his own acts contribute thereto, for any loss of or any injury to such articles if not deposited with him and not required by the guest for present use.

^b Colorado, § 3007. Hereafter every landlord or keeper of a hotel or public inn in this state, who shall provide in the office of his hotel or inn, or other convenient place, a safe, vault, or other suitable receptacle, for the secure custody of money, jewelry, ornaments or other valuable articles, other than necessary baggage, belonging to the guests or patrons of such hotel or public inn, and shall keep posted in a public and conspicuous place in the office, public room and public parlors of such hotel or public inn, and upon the inside entrance door of every public sleeping-room in such hotel or public inn, a notice printed in English, stating such fact, shall not be liable for the loss of any money, jewelry, ornaments or other valuable articles, other than necessary baggage, sus-

tained by such guest or patron by theft or otherwise, unless such guest or patron shall deliver such money, jewelry, ornaments or other valuable articles, other than necessary baggage, to the landlord or keeper of such hotel or public inn, or person in charge of the office of such hotel or public inn, for deposit in such safe, vault or other receptacle; provided, that such liability shall not be greater than the amount at the time of deposit declared by the guest or patron to be the value of the article deposited.

^c Iowa, § 8138, see note ^c to Cal. Civ. Code § 1859.

^d Minnesota, § 2810. Whenever the keeper of a hotel shall provide therein an iron safe suitable for the keeping of valuables, and shall keep posted conspicuously in the office and on the inside of the entrance door to every bedroom, and to every parlor and other public room in the building, a notice to the guests that they may leave their money and other valuables with the proprietor for deposit therein, such keeper shall not be liable for the loss, by theft or otherwise, of valuables not so left for deposit, unless the loss occurs through the negligence of such keeper, or of some agent or servant employed by him. Every such proprietor or manager shall provide locks and bolts for all room doors.

^e Missouri, § 7578. No innkeeper in

this state, who shall constantly have in his inn an iron safe, in good order, and suitable for the safe custody of money, jewelry and articles of gold and silver manufacture, and of the like, and who shall keep a copy of sections 7578 and 7579 printed by itself, in large plain English type, and framed, constantly and conspicuously suspended in the office, barroom, saloon, reading, sitting and parlor room of his inn and also a copy printed by itself, in ordinary-sized plain English type, posted upon the inside of the entrance door of every public sleeping-room of his inn, shall be liable for the loss of any such articles aforesaid, suffered by any guest, unless such guest shall have first offered to deliver such property lost by him to such innkeeper, for custody in such iron safe, and such innkeeper shall have refused or omitted to take it and deposit it in such safe for its custody and to give such guest a receipt therefor.

† Montana, § 5165, same as Arizona § 2920.

g1 Nebraska, § 3764. No innkeeper, or hotelkeeper, whether individual, partnership or corporation, who constantly has in his inn or hotel a metal safe or suitable vault in good order, and fit for the custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones, personal ornaments, railroad mileage books or tickets, negotiable or valuable papers, and bullion, and who keeps on the doors of the sleeping-rooms used by guests suitable locks or bolts, and on the transoms and windows of said rooms suitable fastenings, and who keeps a copy of this section printed in distinct type constantly and conspicuously posted in not less than ten conspicuous places in all in said inn or hotel, shall be liable for the loss or injury suffered by any guest, unless such guest has offered to deliver the same to such innkeeper or hotelkeeper for custody, in such metal safe or vault, and such innkeeper or hotelkeeper has omitted or refused to take it and deposit it in such safe or vault for custody and to give such guest a receipt therefor. Provided, however, that the keeper of any inn or hotel shall not be obliged to receive from any one guest for deposit in such safe or vault any property hereinbefore described exceeding a total value of three hundred dollars, and shall

not be liable for any excess of such property whether received or not.

g2 Nebraska, § 3765. But such innkeeper or hotelkeeper may by special arrangement with a guest receive for deposit in such safe or vault any property upon such terms as they may agree to in writing, but every innkeeper or hotelkeeper shall be liable for any loss of the above enumerated articles of a guest in his inn or hotel after said articles have been accepted for deposit if caused by the theft or negligence of the innkeeper, hotelkeeper, or any of his servants.

h North Dakota, § 5477, substantially same as Arizona § 2920, except in line 2, after "innkeeper," insert "or boarding-house keeper" before "keeps"; also in lines 3 and 6 and in the last line, after "guest," insert "or boarder."

i Oklahoma, § 2854, substantially same as North Dakota § 5477.

j South Dakota, C. C. § 1383, same as North Dakota § 5477.

k Washington, § 1203. No innkeeper who constantly has in his inn an iron safe or suitable vault in good order, and fit for the safe custody of money, bank notes, jewelry, articles of gold and silver manufacture, precious stones and bullion, and who keeps a copy of this section, printed by itself in large, plain Roman type, and framed, constantly and conspicuously suspended in the office, barroom, saloon, reading, sitting, and parlor room of his inn, and also a copy printed by itself in ordinary-sized plain Roman type, posted upon the inside of the entrance door of every public sleeping room of his inn, shall be liable for the loss of any such article suffered by any guest, unless such guest has first offered to deliver such property lost by him to such innkeeper for custody in such iron safe or vault, and such innkeeper has refused or neglected to receive and deposit such property in his safe or vault, and to give such guest a receipt therefor: Provided, that all doors to rooms furnished to guests shall be provided with slide-bolts inside of such rooms on all doors; otherwise he shall be liable; but every innkeeper shall be liable for any loss of the above enumerated articles by a guest in his inn, when caused by the theft or negligence of the innkeeper or any of his servants.

^l Wisconsin, § 1725, substantially same as Missouri § 7578.

^m Wyoming, § 2514. Every landlord or keeper of a public inn or hotel in this state, who shall keep in his place of business an iron safe, in good order and suitable for the purpose hereinafter named, and who shall post or cause to be posted in some conspicuous place in his office, and on the inside of every entrance door to every bedchamber, the notice hereinafter mentioned, shall not

be liable for the loss of any money, jewelry or other valuables belonging to his guests or customers, unless such loss shall occur by the hand or through the negligence of such landlord, or by a clerk or servant employed by him in such hotel or inn; provided, that nothing herein contained shall apply to such amount of money or other valuables as is usually common and prudent for any such guest to retain in his room or about his person.

Lien for charges on baggage.

California, § 1861. Hotel, inn, boarding-house and lodging-house keepers shall have a lien upon the baggage and other property of value of their guests, or boarders, or lodgers, brought into such hotel, inn, or boarding or lodging-house, by such guests, or boarders, or lodgers, for the proper charges due from such guests, or boarders, or lodgers, for their accommodation, board and lodging, and room rent, [and] such extras as are furnished at their own request, with the right to the possession of such baggage or other property of value, until all such charges are paid. (Kerr's Cyc. Civ Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Arizona, Rev. Stats. 1901, § 2916. ^a **Arkansas, Dig. of Stats. 1904 (Kirby), § 5054.** ^b **Colorado, Rev. Stats. 1908, § 4013.** ^c **Hawaii, Laws 1907, p. 192, § 1.** ^d **Iowa, Ann. Code 1897, § 3138.** ^e **Missouri, Ann. Stats. 1906, § 4237.** ^f **Montana, Rev. Codes 1907, § 5166.** ^g **Nebraska, Comp. Stats. Ann. 1909, § 3766a; Ann. Stats. (Cobbey), § 6391.** ^h **New Mexico, Comp. Laws 1897, § 2239.** **North Dakota, Rev. Codes 1905, § 6292.** ⁱ **Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2853; Comp. Laws 1909 (Snyder), § 3014.** ^j **Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 5703.** ^k **South Dakota, Rev. Codes 1903, C. C. § 1381.** ^l **Texas, Civ. Stats. 1897 (Sayles), Art. 3318.** ^m **Utah, Comp. Laws 1907, § 1402.** ⁿ **Washington, Code 1910 (Rem. & Bal.), § 1201.** ^o **Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 3344.** ^p **Wyoming, Rev. Stats. 1899, § 2860.**

^a **Arkansas, § 5054.** Every person operating any hotel, inn or boarding-house in this state shall have a lien upon the baggage and personal effects of all persons receiving food, entertainment or accommodation thereat or therefrom.

^b **Colorado, § 4013.** * * * The keeper of any hotel, tavern, or boarding-house, or any person who rents furnished or unfurnished rooms, shall have a lien upon the baggage and furniture of his

or her patrons, boarders, guests or tenants, for such boarding, lodging or rent, and for all costs incurred in enforcing such lien; provided, that the provisions of this section shall not apply to stolen stock.

^c **Hawaii, Laws 1907, p. 192, § 1,** substantially same as Cal. Civ. Code § 1861, except at the opening after "Hotel" omit "inn, boarding-house, and lodging-house" before "keepers"; also, in line 4

omit "inn, or boarding or lodging-house" before "by such guests."

d Iowa, § 3138, see note c to Cal. Civ. Code § 1859.

e Missouri, § 4237. Hotel, inn and boarding-house keepers shall have a lien upon the baggage and other valuables of their guests or boarders brought into such hotel, inn or boarding-house by such guests or boarders, and upon the wages of such guests or boarders, for their proper charges due from such guests or boarders for their accommodation, boarding and lodging, and such extras as are furnished at their request.

f Montana, § 5166. Hotelmen, boarding-house and lodging-house keepers shall have a lien upon the baggage and other property of value brought into such hotel, inn or boarding or lodging house, by such guest or boarder or lodger, for their accommodation, board or lodging and room rent and such extras as are furnished at their request, with the right of the possession of such baggage or other property of value, until all such charges are paid. Provided, however, that nothing herein contained shall be construed to give a lien upon property sold on the instalment plan and title to which is to remain in the vendor until final payment.

g Nebraska, § 3766a. The keeper of any inn or hotel whether individual, partnership or corporation, shall have a lien on the baggage and other property in and about such inn belonging to or under the control of his guests or boarders for the proper charges due him from such guests or boarders, for the accommodation, board and lodging, and for all money paid for or advanced to them not to exceed the sum of two hundred dollars, and for such other extras as are furnished at their request, and said innkeeper or hotelkeeper shall have the right to detain such baggage and other property until the amount of such charges is paid, and such baggage and other property shall be exempt from attachment, or execution until such innkeeper's lien and the cost of satisfying it are satisfied.

h New Mexico, § 2239. Innkeepers and livery stable keepers, and those who board others for pay, or furnish feed or shelter for the property and stock of others, shall have a lien on the property and stock of such guest or guests, or of

those to whom feed or shelter has been furnished while the same is in their possession, and until the same is paid.

i Oklahoma, § 2853, see note h to Cal. Civ. Code § 1859.

j Oregon, § 5703. Hotelkeepers, innkeepers, lodging-house keepers, and boarding-house keepers shall have a lien upon the baggage, clothing, jewelry, and other valuables of their guests, lodgers, or boarders brought into such hotel, inn, lodging-house, or boarding-house by such guest, lodger, or boarder for the reasonable charges due from such guests, lodgers, or boarders for their accommodation, board, or lodging, and such extras as are furnished at the request of such guest, lodger, or boarder; and such hotelkeeper, innkeeper, lodging-house keeper, or boarding-house keeper may retain and hold possession of such baggage, clothing, jewelry, and other valuables until such charges be paid.

k South Dakota, Civ. Code § 1381, substantially same as Oklahoma § 2853, see note i to Cal. Civ. Code § 1859.

l Texas, Art. 3318. Proprietors of hotels and boarding-houses shall have a special lien upon all property or baggage deposited with them for the amount of the charges against them or their owners if guests at such hotel and boarding-house.

m Utah, § 1402. Every hotel, tavern, or boarding-house keeper, or person who lets furnished rooms shall have a lien upon the baggage of his patrons, boarders, guests, and tenants for the amount that may be due from any such persons for such boarding, lodging, or rent, and he is hereby authorized to hold and retain possession of such baggage until the amount so due for boarding, lodging, or rent, or either, is paid.

n Washington, § 1201. Hereafter all hotelkeepers, innkeepers, lodging-house keepers, and boarding-house keepers in this state shall have a lien upon the baggage, property, or other valuables of their guests, lodgers, or boarders brought into such hotel, inn, lodging-house, or boarding-house by such guests, lodgers, or boarders, for the proper charges due from such guests, lodgers, or boarders for their accommodation, board, or lodging, and such other extras as are furnished at their request, and shall have the right to retain in their possession such baggage, property, or

other valuables until such charges are fully paid, and to sell such baggage, property, or other valuables for the payment of such charges in the manner provided in the next succeeding section of this chapter.

o Wisconsin, § 3344. Every innkeeper and every keeper of a boarding-house shall have a lien upon and retain the possession of the baggage and effects of any guest or boarder for the amount which may be due him for board from such guest or boarder until such amount is paid; and every keeper of a livery or boarding-stable, and every person pasturing or keeping any horses, carriage, harness, mules, cattle or stock shall

have a lien upon and may retain the possession of any such horses, carriage, harness, mules, cattle or stock for the amount which may be due him for the keeping, supporting and care thereof until such amount is paid.

p Wyoming, § 2860. Any keeper of a hotel or boarding-house or lodging-house or restaurant shall have a lien upon the baggage or other personal property of any person who shall have obtained board or lodging or both, from such keeper, for the amount due for such board or lodging, and such keeper is hereby authorized to retain the possession of such baggage, or personal property until said amount is paid. * * *

§ 331. COMPLAINTS [OR PETITIONS].

FORM No. 687—Against an innkeeper, for loss of baggage.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That at the times hereinafter mentioned the defendant was the keeper of an inn [or hotel] in _____, known as [here give the name of such inn or hotel].

2. That on the _____ day of _____, 19____, plaintiff was received in said inn [or hotel] by defendant as a traveler and guest; that at said time and place the plaintiff delivered his baggage to defendant, the same consisting of a trunk [or valise, etc.]; that said trunk [or valise, etc.] contained the following articles: [Here specify], and all of the value of \$ _____.

3. That the defendant and his servants conducted themselves so negligently and carelessly in regard to the same that while plaintiff remained at said inn [or hotel] as such traveler and guest his said trunk [or valise or other thing deposited] and its contents were taken away from the room in said inn [or hotel] occupied by plaintiff as such guest, by some person or persons to the plaintiff unknown, and thereby the same became wholly lost to the plaintiff, to his damage in the sum of \$ _____.

Wherefore, plaintiff prays judgment against defendant for \$ _____, and plaintiff's costs of this action.

A. B., Attorney for plaintiff.

[Verification.]

FORM No 688—To recover for loss of pocket-book containing money.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant was a hotel-keeper [or a common innkeeper] at , and on said day, as such, he received and entertained plaintiff as a guest at his hotel [or inn] for hire.

2. That while the plaintiff was such guest, the defendant undertook, for compensation paid him by the plaintiff, to keep safely in one of his sleeping-rooms of his said hotel [or inn] the clothing and such articles of jewelry and valuables as the plaintiff then had upon his person, and that the plaintiff thereupon put into his said sleeping-room in said hotel [or inn] his clothing, his pocket-book containing \$ in money, and left the same in the possession and charge of the defendant, both as innkeeper and as special bailee as aforesaid.

3. That while plaintiff was sleeping, his pocket-book and money were, by the negligence, carelessness, dishonesty, and improper supervision of the defendant and his servants, lost and stolen.

4. That the amount of the said money belonging to the plaintiff so lost and stolen, while the same was under the charge of the defendant, was \$ and upwards; that the plaintiff is by profession and occupation [state business], and that said sum was such as he might reasonably and properly carry with him with reference to his circumstances and business.

[Concluding part.]

FORM No. 689—Against innkeeper, for refusal to receive and lodge guest.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant was the keeper of a common inn [or hotel] at , known as the Hotel, for the accommodation of travelers.

2. That on said date the plaintiff, then being a traveler, came to said inn [or hotel] and required the defendant to receive and lodge him as a guest during the night next ensuing.

3. That the plaintiff was ready and willing, and offered, to pay the defendant his reasonable charges for such lodging.

4. That the defendant had ample room and accommodation to receive and lodge the plaintiff during said time, but refused to receive

him or permit him to lodge at said inn, whereby [allege any special damages], to his damage in the sum of \$.

[Concluding part.]

FORM No. 690—By Innkeeper, for board and lodging.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff received the defendant at his request as boarder and lodger, and continued to board and lodge him until the day of , 19 , for which the defendant agreed to pay this plaintiff \$ per week.

2. By reason of the premises, the defendant is indebted to the plaintiff in the sum of \$, with interest from .

3. [Same as paragraph 2, form No. 684.]

[Concluding part.]

§ 332. ANSWERS.

FORM No. 691—Defense that plaintiff was not a guest.

[Title of court and cause.]

[After introductory part:]

Defendant denies that the plaintiff at the time alleged in the complaint herein, or at any other time or at all, was a guest at the hotel [or inn] of the plaintiff.

[Follow with denials conformably to this defense.]

[Concluding part.]

FORM No. 692—Defense where moneys [or other valuables] lost were not deposited with the Innkeeper for safe-keeping.

[Title of court and cause.]

[After introductory part and denials appropriate to this defense:]

Defendant alleges, that at the time mentioned in the complaint herein, and for a long time prior thereto, he kept in the office of said inn [or hotel] a fire-proof safe for use in the safe-keeping of the money, jewelry, documents, and other valuables of the guests of said inn [or hotel].

And defendant further alleges, that at the time plaintiff was received as a guest in said inn [or hotel], and for a long time prior thereto, there was posted in a conspicuous place in each of the rooms in said inn [or hotel], including the room occupied by the plaintiff,

a printed notice, of which the following is a copy: [Here insert copy of notice such as is provided by statute for limiting liability of an innkeeper, and informing guests of the fact that a fire-proof safe is provided for the safe-keeping of money and valuables, and disclaiming liability where money or valuables are not deposited for safe-keeping, etc.] That if any loss of money [etc.] was suffered by the plaintiff, as alleged, such loss was wholly through the fault and negligence of the plaintiff himself, and not by any act of the defendant.

[Concluding part.]

For defense that thing deposited or alleged to have been lost is held as a pledge, see ch. XCIII, form No. 695, changing the said form to allege an indebtedness for accommodations at the inn (or hotel), and following with the averment that the thing claimed to have been lost or stolen is held as a lien to secure the payment of said charges.

CHAPTER XCIII.

Bailment or Deposit.

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§ 333. CODE PROVISIONS.

Deposit, kinds of.

California, § 1813. A deposit may be voluntary or involuntary; and for safe-keeping or for exchange. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5133. **North Dakota**, Rev. Codes 1905, § 5447. **Oklahoma**, Rev. and Ann. Stats. 1903 (Wilson), § 2824; Comp. Laws 1909 (Snyder), § 2985. **South Dakota**, Rev. Codes 1903, C. C. § 1352.

Exchange defined.

California, § 1804. Exchange is a contract by which the parties mutually give, or agree to give, one thing for another, neither thing, or both things, being money only. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5129. **North Dakota**, Rev. Codes 1905, § 5443. **South Dakota**, Rev. Codes 1903, C. C. § 1348.

Deposit for exchange.

California, § 1818. A deposit for exchange is one in which the depositary is only bound to return a thing corresponding in kind to that which is deposited. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5138. North Dakota, Rev. Codes 1905, § 5452. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2829; Comp. Laws 1909 (Snyder), § 2990. South Dakota, Rev. Codes 1903, C. C. § 1357.

Depositary's obligation to deliver on demand.

California, § 1822. A depositary must deliver the thing to the person for whose benefit it was deposited, on demand, whether the deposit was made for a specified time or not, unless he has a lien upon the thing deposited, or has been forbidden or prevented from doing so by the real owner thereof, or by the act of the law, and has given the notice required by section eighteen hundred and twenty-five. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5139. North Dakota, Rev. Codes 1905, § 5453. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2830; Comp. Laws 1909 (Snyder), § 2991. South Dakota, Rev. Codes 1903, C. C. § 1358.

Demand is necessary to charge depositary with breach of duty.

California, § 1823. A depositary is not bound to deliver a thing deposited without demand, even where the deposit is made for a specified time. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5140. North Dakota, Rev. Codes 1905, § 5454. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2831; Comp. Laws 1909 (Snyder), § 2992. South Dakota, Rev. Codes 1903, C. C. § 1359.

Notice to owner of adverse proceedings.

California, § 1825. A depositary must give prompt notice to the person for whose benefit the deposit was made, of any proceedings taken adversely to his interest in the thing deposited, which may tend to excuse the depositary from delivering the thing to him. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5142. North Dakota, Rev. Codes 1905, § 5456. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2833; Comp. Laws 1909 (Snyder), § 2994. South Dakota, Rev. Codes 1903, C. C. § 1361.

Notice by depositary to owner of thing wrongfully detained.

California, § 1826. A depositary, who believes that a thing deposited with him is wrongfully detained from its true owner, may give him notice of the deposit; and if within a reasonable time afterwards he does not claim it, and sufficiently establish his right thereto, and indemnify the depositary against the claim of the depositor, the depositary is exonerated from liability to the person to whom he gave the notice, upon returning the thing to the depositor, or assuming, in good faith, a new obligation changing his position in respect to the thing, to his prejudice. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5143. North Dakota, Rev. Codes 1905, § 5457. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2834; Comp. Laws 1909 (Snyder), § 2995. South Dakota, Rev. Codes 1903, C. C. § 1362.

Joint deposits by two or more persons.

California, § 1828. When a deposit is made in the name of two or more persons, deliverable or payable to either or to their survivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Arizona, Rev. Stats. 1901, § 2126. b Arkansas, Dig. of Stats. 1904 (Kirby), § 4423. c Montana, Laws 1909, p. 159, ch. 110, § 1. d Nebraska, Comp. Stats. Ann. 1909, § 747x; Ann. Stats. (Cobbey), § 3792. e Oregon, Gen. Laws 1907, p. 262, § 19.

a Arizona, § 2126. Where two or more persons hold an estate, real, personal or mixed, jointly, and one joint owner dies before severance, his interest in said joint estate shall not survive to the remaining joint owners, but shall descend to and be vested in the heirs and legal representatives of such deceased joint owner, in the same manner as if his interest had been severed and ascertained.

b Arkansas, § 4423. All survivorships of real and personal estate are forever abolished.

c Montana, Laws 1909, p. 159, chap. 110, § 1. When a deposit has been made, or shall hereafter be made, in any bank,

savings bank, banking institution, or trust company, transacting business in this state, in the name of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof, or any interest or dividend thereon, may be paid to either of said persons whether the other be living or not; and the receipt or acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made. (Enacted March 8, 1909.)

d Nebraska, § 747x. When a deposit in any bank in this state is made in the name of two or more persons, deliverable or payable to either or to their sur-

vivor or survivors, such deposit or any part thereof, or increase thereof, may be delivered or paid to either of said persons or to the survivor or survivors in due course of business.

• Oregon, Gen. Laws 1907, pp. 262, 267, § 19. * * * When a deposit has been made or shall hereafter be made in the name of two persons, payable to either, or payable to either or the survivor, such deposit, or any part thereof,

or interest or dividends thereon, may be paid to either of the said persons whether the other be living or not, and the receipt or acquittance of the person so paid shall be valid and sufficient release and discharge to the bank for any payment so made. This section shall apply to all banking institutions, including national banks, within this state. (Enacted February 25, 1907.)

Depositor must indemnify depositary.

California, § 1833. A depositor must indemnify the depositary:

1. For all damage caused to him by the defects or vices of the thing deposited; and,

2. For all expenses necessarily incurred by him about the thing, other than such as are involved in the nature of the undertaking. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5145. North Dakota, Rev. Codes 1905, § 5459. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2836; Comp. Laws 1909 (Snyder), § 2997. South Dakota, Rev. Codes 1903, C. C. § 1364.

Depositary's liability for negligence.

California, § 1840. The liability of a depositary for negligence cannot exceed the amount which he is informed by the depositor, or has reason to suppose, the thing deposited to be worth. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5152. North Dakota, Rev. Codes 1905, § 5466. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2843; Comp. Laws 1909 (Snyder), § 3004. South Dakota, Rev. Codes 1903, C. C. § 1371.

Lien of depositary for hire.

California, § 1856. A depositary for hire has a lien for storage charges and for advances and insurance incurred at the request of the bailor, and for money necessarily expended in and about the care, preservation and keeping of the property stored, and he also has a lien for money advanced at the request of the bailor, to discharge a prior lien, and for the expenses of a sale where default has been made in satisfying a valid lien. The rights of the depositary for hire to such lien are regulated by the title on liens. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Alaska, Ann. Codes 1907, C. C. (Carter), § 277. ^b Arizona, Laws 1907, p. 59, ch. 47, § 3. ^c Colorado, Rev. Stats. 1908, § 4014. ^d Hawaii, Laws 1909, p. 177, § 2. ^e Idaho, Rev. Codes 1909, § 1546. ^f Iowa, Ann. Code 1897, Sup. 1907, § 3138a-27. ^g Kansas, Laws 1909, p. 629, § 27. ^h Minnesota, Laws 1907, p. 123, § 1. ⁱ Nebraska, Comp. Stats. Ann. 1909, § 6329; Ann. Stats. (Cobbey), § 12176. ^j New Mexico, Laws 1909, p. 86, § 27. ^k Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 5704. ^l Utah, Comp. Laws 1907, § 1403. ^m Wisconsin, Laws 1909, § 1684m-29. ⁿ Wyoming, Rev. Stats. 1899, § 2846.

^a Alaska, C. C. § 277. Any person who is a common carrier, or who shall, at the request of the owner or lawful possessor of any personal property, carry, convey, or transport the same from one place to another, and any person who shall safely keep or store any grain, wares, merchandise, and personal property at the request of the owner or lawful possessor thereof, and any person who shall pasture or feed any horses, cattle, hogs, sheep, or other livestock, or bestow any labor, care, or attention upon the same at the request of the owner or lawful possessor thereof, shall have a lien upon such property for his just and reasonable charges for the labor, care, and attention he has bestowed and the food he has furnished, and he may retain possession of such property until such charges be paid.

^b Arizona, Laws 1907, pp. 59, 60. § 3. Any railroad company, express company or common carrier, having any undelivered baggage or freight in its possession, may, after first giving five days' notice in writing by mail, to the consignee or owner thereof, if known, of its intention so to do, deliver such baggage, or freight, to a warehouseman for storage, upon such warehouseman's paying to the railroad company, express company or common carrier, the amount of freight or charges due thereon. The warehouseman shall have a lien thereon for the amount of freight and charges so paid, with interest at the legal rate, as well as for storage. If said amounts are not paid to the warehouseman within six months after such freight or baggage is so received by him, he may sell the same, in the manner and subject to the same provisions as heretofore prescribed for the sale of other property on which charges are unpaid for a period

of six months. (Enacted March 18th, 1907.)

^c Colorado, § 4014. Every common carrier of goods or passengers who shall, at the request of the owner of any personal goods, carry, convey or transport the same from one place to another; and any warehouseman or other person who shall safely keep or store any personal property at the request of the owner or person lawfully in possession thereof, shall in like manner have a lien upon all such personal property for his reasonable charges for the transportation, storage or keeping thereof, and for all reasonable and proper advances made thereon by him, in accordance with the usage and custom of common carriers and warehousemen.

^d Hawaii, Laws 1909, p. 177, § 2. A warehouseman shall have a lien upon any property stored with him until all reasonable charges thereon, are paid. Such lien shall have priority over other liens of any nature and over all attachments. (Enacted April 28, 1909.)

^e Idaho, § 1546. When any goods, merchandise or other property has been received by any railroad or express company, or other common carrier, commission merchant, innkeeper or warehouseman for transportation or safe keeping, and is not delivered to the owner, consignee or other authorized person, the carrier, commission merchant, innkeeper or warehouseman may hold or store the same with some responsible person, until the freight and all just and reasonable charges are paid.

^f Iowa, § 3138a-27. Subject to the provisions of section thirty (30), a warehouseman shall have a lien on goods deposited or on the proceeds thereof in his hands, for all lawful charges for storage and preservation of the goods; also for

all lawful claims for money advanced, interest, insurance, transportation, labor, weighing, cooping and other charges and expenses in relation to such goods; also for all reasonable charges and expenses for notice, and advertisements of sale, and for sale of the goods where default has been made in satisfying the warehouseman's lien. (Sup. 1907.)

g Kansas, Laws 1909, pp. 629, 635, § 27, same as Iowa § 3138a-27.

h Minnesota, Laws 1907, p. 123, § 1. Whoever at the request of the owner or legal possessor of any personal property shall store or care for or contribute in any of the modes mentioned in the next section to its preservation, care, or to the enhancement of its value, shall have a lien upon such property for the price or value of such storage, care or contribution, and for any legal charges against the same paid by such person to any other person, and the right to retain the property in his possession until such lien is lawfully discharged; but a voluntary

surrender of possession shall extinguish the lien herein given. (Amended April 5, 1907.)

i Nebraska, § 6329, same as Iowa § 3138a-27.

j New Mexico, Laws 1909, pp. 86, 94, § 27, same as Iowa § 3138a-27.

k Oregon, § 5674, same as Alaska Civ. Code § 277.

l Utah, § 1403. Every warehouseman or other person who shall safely keep or store any personal property at the request of the owner or person lawfully in possession thereof shall in like manner have a lien upon all such property for his reasonable charges for the storage or keeping thereof, and for all reasonable and proper advances made thereon by him in accordance with the usage and custom of warehousemen.

m Wisconsin, Laws 1909, § 1684m-29, same as Iowa § 3138a-27.

n Wyoming, § 2846, same as Colorado § 4014.

Endorsement on negotiable receipt of property delivered.

California, § 1858c. If a negotiable receipt is issued for any property, neither the person issuing it nor any other person into whose care or control the property comes must deliver any part thereof without endorsing on the back of the receipt in ink, the amount and date of the delivery; nor can he be allowed to make any offset, claim, or demand other than is expressed on the face of the receipt, when called upon to deliver any property for which it was issued. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Arkansas, Dig. of Stats. 1904 (Kirby), § 530. b Iowa, Ann. Code 1897, Sup. 1907, § 3138a-12. c Kansas, Laws 1909, p. 629, § 12. d Missouri, Ann. Stats. 1906, § 7638. e Nebraska, Comp. Stats. Ann. 1909, § 6314; Ann. Stats. (Cobbey), § 12161. f New Mexico, Laws 1909, p. 86, § 12. g Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 6759; Comp. Laws 1909 (Snyder), § 8838. h South Dakota, Rev. Codes 1903, Pol. Code § 497. i Wisconsin, Laws 1909, § 1684m-13.

a Arkansas, § 530. Warehouse receipts given by any warehouseman, wharfinger or other person or firm for any goods, wares, merchandise, cotton, grain, flour or other produce or commodity, stored or deposited, and all bills of lading and

transportation receipts of every kind given by any carrier, boat, vessel, railroad, transportation or transfer company, may be transferred by endorsement in writing thereon, and the delivery thereof so endorsed, and any and

all persons to whom the same may be transferred shall be deemed and held to be the owner of such goods, wares, merchandise, cotton, grain, flour or other produce or commodity, so far as to give validity to any pledge, lien or transfer given, made or created thereby, as on the faith thereof, and no property so stored or deposited, as specified in such bills of lading or receipts, shall be delivered except on surrender and cancelation of such receipts and bills of lading; provided, that all such receipts and bills of lading which shall have the words, "Not negotiable," plainly written or stamped on the face thereof, shall be exempt from the provisions of this act.

b Iowa, § 3138a-12. Except as provided in section thirty-six (36), where a warehouseman delivers part of the goods for which he had issued a negotiable receipt and fails either to take up and cancel such receipt, or to place plainly upon it a statement of what goods or packages have been delivered he shall be liable, to any one who purchases for value in good faith such receipt, for failure to deliver all the goods specified in the receipt, whether such purchaser acquired title to the receipt before or after the delivery of any portion of the goods by the warehouseman. (Enacted April 1, 1907, Sup. 1907.)

c Kansas, Laws 1909, pp. 629, 631, § 12, same as Iowa, Laws 1907, p. 157, § 12.

d Missouri, § 7638. No public warehouse or public elevator receipt shall be issued except upon actual delivery of grain into such warehouse or elevator from which it purports to be issued, and which is to be represented by the receipt; nor shall any receipt be issued for a greater quantity of grain than was contained in the lot stated to have been received, nor shall more than one receipt be issued for the same lot of grain except in cases where receipts for a part of a lot are desired, and then the aggregate receipts for a particular lot shall cover that lot and no more. In cases where a part of the grain represented by the receipt is delivered out of such warehouse or elevator, and the remainder is left, a

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new receipt may be issued for such remainder; but such new receipt shall bear the same date as the original, and shall state on its face that it is the balance of receipt of the original number, and the receipt upon which a part has been delivered shall be canceled in the same manner as if the grain it called for had all been delivered. In case it be desirable to divide one receipt into two or more, or in case it be desirable to consolidate two or more receipts into one, and the warehouseman or elevatorman consents thereto, the original receipt shall be canceled the same as if the grain had been delivered from such warehouse or elevator; and the new receipts shall state on their face that they are parts of other receipts or a consolidation of other receipts, as the case may be; and the numbers of the original receipts shall also appear upon the new ones issued explaining the change, and all new receipts issued for old ones canceled as herein provided, shall bear the same dates as those originally issued, as near as may be. (Amended Apr. 12, 1907, Laws 1907, pp. 285, 290.)

e Nebraska, § 6314, same as Iowa § 3138a-12.

f New Mexico, Laws 1909, p. 86, § 12, same as Iowa § 3138a-12.

g Oklahoma, § 6759, substantially same as Missouri § 7638, except omit "or public elevator" in line 2; also "or elevator" wherever the words occur throughout; also in line 5 from the end after "change" insert "; but no consolidation of receipts of dates differing more than ten days shall be permitted," before "and all new."

h South Dakota, Pol. C. § 497. Upon the delivery of grain from store upon any receipt, such receipt shall be plainly marked across its face the word "canceled", and shall thereafter be void and shall not again be put in circulation, nor shall grain be delivered twice upon the same receipt. * * * (Remainder the same as Oklahoma § 6759.)

i Wisconsin, Laws 1909, § 1684m-12, substantially same as Iowa § 3138a-12.

§ 334. COMPLAINT [OR PETITION].**FORM No. 693—For damages against a bailee of goods.**

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , and at , plaintiff delivered to the defendant, and defendant received from plaintiff, the following-described goods and chattels, to wit: [Here describe]. then and ever since the property of plaintiff; that said goods and chattels were at said time and thereafter of the value of \$; that said goods and chattels were, upon said delivery, to be by the defendant safely and securely kept for the plaintiff, and returned and delivered to plaintiff on demand, for the compensation for such keeping of \$, to be paid to the defendant by plaintiff upon return and delivery thereof. [Or state when the said sum was to have been paid.]

2. That plaintiff duly performed all the conditions of said contract on his part, and on the day of , 19 , he offered to pay, and tendered to defendant, said sum of \$, for said keeping, and demanded of him the return of said goods and chattels; that plaintiff was then, and has ever since been, ready, able, and willing to pay said compensation for safe-keeping of said goods and chattels, but the defendant neglected and refused, and ever since has neglected and refused, to return said goods and chattels, or any part thereof, to plaintiff.

[If any loss or damage has resulted to said goods, allege as follows:] That the defendant so negligently and carelessly kept said goods, and took so little care thereof, that by and through the carelessness and negligence of defendant and his servants said goods were lost to plaintiff [or were damaged in this, here state], all to the damage of plaintiff in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for \$ and plaintiff's costs of this action. A. B., Attorney for plaintiff.

[Verification.]

§ 335. ANSWERS.**FORM No. 694—Denial of bailment.**

[Title of court and cause.]

Defendant, answering plaintiff's complaint [or petition], denies:

That he ever received the plaintiff's goods, or any thereof, de-

scribed in the complaint [or petition] as bailee, as alleged therein, or otherwise, or at all.

FORM No. 695—Defense that thing deposited is held as a pledge.

[Title of court and cause.]

[After introductory part:]

The defendant alleges that on or about the day of , 19 , the defendant loaned to the plaintiff the sum of \$, which loan is still due and unpaid; that the said property bailed was delivered by the plaintiff to the defendant as security for said loan, and not as a bailment as alleged in said complaint.

[Concluding part.]

Form of findings in an action by an assignee, to compel defendant, a bank, to account for certain deposits made by assignor, and for the interest and profits accruing thereon, and to set aside certain alleged fraudulent transfers of property by defendant: *Cross v. Sacramento Sav. Bank*, 66 Cal. 462, 6 Pac. 94, 95.

Form of answer in an action to recover money which had been deposited in a bank by a decedent in his lifetime, which, it was alleged, belonged to his estate, and therefore to the possession of the plaintiff, by virtue of his appointment as administrator: *Wichita Nat. Bank v. Maltby*, 53 Kan. 567, 36 Pac. 1000, 1001.

Form of petition in an action to recover money deposited with a bank: *Bank of LeRoy v. Harding*, 1 Kan. App. 389, 391, 41 Pac. 680, 681.

For special defenses interposed in an action to recover a bank deposit, see *Whitesett v. People's National Bank*, 138 Mo. App. 81, 119 S. W. 999, et seq.

Defense based upon ratification of transfer of a bank deposit, interposed in an action to recover such deposit; held, proper and sufficiently pleaded in *Whitesett v. People's National Bank*, 138 Mo. 81, 199 S. W. 999, 1000, 1002.

Defense of adverse claim.—A bailee can not set up title of a third person in an action brought against him by bailor, except by authorization of that person: *Dodge v. Meyer*, 61 Cal. 405. See *Bull v. Houghton*, 65 Cal. 422, 425, 4 Pac. 529; *Weatherly v. Straus*, 93 Cal. 283, 287, 28 Pac. 1045.

CHAPTER XCIV.

Partnership and Accounting.

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§ 336. COMPLAINTS [OR PETITIONS].

FORM No. 696—For the dissolution of a partnership, and for an accounting and receivership.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , plaintiff and defendant formed and entered into a partnership under articles of copartnership, of which the following is a copy: [Here insert copy; or, if preferred, plead and set forth the same as an exhibit.]

2. That on the day of , 19 , the plaintiff and defendant commenced to carry on at [here state location], and have ever since continued to carry on said partnership business under said partnership contract at said place.

3. That since the commencement of said partnership business the defendant has from time to time used for his individual use and benefit large sums of money from the receipts and profits of said partnership business, exceeding the proportion thereof to which he was entitled, and has refused, and still refuses, to account with or to the plaintiff for the same, although plaintiff has often requested and demanded of the defendant that such accounting be had.

4. Plaintiff is informed and believes, and upon such information and belief alleges, that the defendant has received about the sum of \$, over and above his just proportion of the copartnership profits; plaintiff further alleges, that the defendant continues to collect the debts due the copartnership, and that he continues to appropriate the money so collected to his individual use.

Wherefore, plaintiff prays judgment against defendant: That said partnership be dissolved; that an accounting be taken of the affairs thereof, and that plaintiff have and recover of the defendant the amount due the plaintiff from the defendant as the same shall be by said accounting determined; that a receiver be appointed to take possession of the property and assets of said partnership, and that said receiver be authorized to sell the property of said partnership, and collect the debts due the same, and out of the money so realized that he pay the expenses of said receivership and the debts of said partnership, and that the residue, if any, be divided between plaintiff and defendant, according to their respective interests, under the agreement aforesaid; and for such other and further relief as to

the court may seem just and equitable, and for plaintiff's costs of suit herein.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 697—For an accounting after dissolution.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on or about the day of , 19 , the plaintiff entered into partnership with the defendant for the purpose of carrying on the business of , at , for the term of years next thereafter.

2. That the plaintiff paid in, as capital to the said business, the sum of \$, and the defendant paid in, as capital, the sum of \$, and on the day of , 19 , the plaintiff and defendant commenced said business as partners, under the firm name of , and continued in the same until the day of , 19 .

3. That at the time last mentioned, by the mutual consent of said partners, the said firm was dissolved.

4. That at such time the defendant agreed with the plaintiff to take the stock on hand at a valuation of \$, and also to collect the debts due said firm, and pay the debts due by the same, and render from time to time to the plaintiff, on demand, full statements of the debts due to and owing by said firm, and the payments made on account thereof, and on a final adjustment to pay over to the plaintiff his full share of the assets of said firm.

5. That the defendant, accordingly, proceeded to take possession of all the assets of said firm, and has collected the debts due to said firm and applied the proceeds to his own use, instead of paying the debts thereof, and distributing any balance coming to the plaintiff.

6. That the plaintiff has frequently requested the defendant to give him a statement of the assets of said firm which came to his hands, and of his proceedings in the premises, but the defendant has neglected and refused to render any such account, or to pay over to the plaintiff any portion of said assets.

Wherefore, the plaintiff prays judgment, that the defendant be compelled to account with him for said assets, and that he be ordered to pay over to the plaintiff any balance found in his hands coming to him, and for such other relief as may be just, together with the costs of this suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 698—To restrain late partner from continuing business

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff and defendant executed under their hands and seals articles of copartnership for the regulation of their business as [state what business], at .

2. That on the day of , 19 , said partnership was dissolved by mutual consent, the plaintiff buying the defendant's interest in said business and all the stock in trade and good-will thereof, and the defendant in consideration of said purchase agreeing with the plaintiff not to carry on the same business in the same city in competition with the plaintiff.

3. That this plaintiff has duly performed all the conditions of said agreement on his part to be performed, and is engaged in continuing said business at the same place.

4. That the defendant in violation of said agreement has opened a store [or office], and is carrying on the business of therein, on Street, in said city, within blocks of the plaintiff's store [or office], and in competition therewith, and threatens to and will, unless restrained by this court, continue to carry on the same.

5. That the said acts of the defendant in violation of said agreement are a continuing injury to and interference with the plaintiff's business, and prevent its establishment and greatly reduce the plaintiff's profits, and can not be fully compensated in damages.

Wherefore, the plaintiff prays, that the defendant be restrained by injunction from carrying on or in any wise engaging in said business in said city, and that the plaintiff have his costs of this suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 699—By one partner against another, for breach of agreement to pay firm debts.

(In *Gillen v. Peters*, 39 Kan. 489; 18 Pac. 613.)

[Title of court and cause.]

Now comes J. C. Gillen, plaintiff, and alleges the following facts constituting his cause of action against F. J. Peters; that is to say:

1. Said F. J. Peters and J. C. Gillen, the plaintiff herein, on or about the 1st day of August, 1886, purchased a herd of horses, to wit, 67 head, together, each owning an undivided one-half interest, and

on or about the 3d day of November, 1886, plaintiff and defendant purchased of the Chicago Lumber Company a bill of lumber, amounting in the aggregate to \$338.15, for which lumber, purchased as aforesaid, plaintiff and defendant obligated themselves to pay said lumber company upon demand. Plaintiff further alleges, that on the 20th day of November, 1886, he sold to defendant his undivided one-half interest in the herd of horses, and at the same time, for a valuable consideration, defendant assumed the payment of said lumber bill, and did thereby obligate himself to pay said lumber company all of said indebtedness, which plaintiff and defendant were jointly and severally bound to pay as aforesaid. A copy of said agreement is hereto attached, marked "Exhibit A," and made part of this petition.¹

2. Plaintiff further alleges that defendant has wholly neglected and omitted to pay said indebtedness, or any part thereof, and by reason of such neglect and refusal to pay as agreed upon, said plaintiff has been sued by the Chicago Lumber Company; that said claim is now due and unpaid.

Wherefore, plaintiff asks judgment against the defendant in the sum of \$342.85, with interest at seven per cent from the 20th day of November, 1886, and costs of this suit.

A. B., Attorney for plaintiff.

[Verification.]

Form of petition in an action on a contract to pay the debts of a partnership: *Gillen v. Peters*, 39 Kan. 489, 18 Pac. 613.

Form of complaint in an action for an accounting and winding up of a partnership: *Tarabino v. Nicoll*, 5 Colo. App. 545, 546, 39 Pac. 362.

Form of complaint in an action at law for the breach of an executory contract to form a future copartnership: *Hill v. Palmer*, 56 Wis. 123, 124, 14 N. W. 20, 43 Am. Rep. 703.

§ 337. ANNOTATIONS.—Partnership and accounting.

1. Non-joinder of parties plaintiff.
2. Interest of single partner.—To what extends.
3. Joint action at law, when not maintainable.
4. General allegations showing purpose to refund.
- 5, 6. Nominal parties.—Set-off.

1. Non-joinder of parties plaintiff.—Where the evidence shows that the plaintiff had a partner who was interested with him in the demands sued upon, and who is not joined as a party to an action, objection is deemed to be waived unless raised in the pleading: *Ah Tong*

v. Earle Fruit Co., 112 Cal. 679, 682, 45 Pac. 7; *Dewey v. Parcels*, 137 Cal. 305, 306, 70 Pac. 174. See *Williams v. Southern Pacific R. Co.*, 110 Cal. 457, 42 Pac. 974.

2. Interest of a single partner extends to entire demand in actions upon con-

¹ A copy of the agreement is annexed to the complaint, the same being merely a contract upon the part of the defendant to pay certain of the firm's debts, including the debt mentioned in the complaint.

§ 338. COMPLAINTS [OR PETITIONS].

FORM No. 700—By a foreign corporation against its agent and manager, for an accounting.

(In *Great Western G. Co. v. Chambers*, 153 Cal. 307; 95 Pac. 151.) ¹

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That at all times mentioned herein the plaintiff was a corporation duly incorporated and existing under and by virtue of the laws of the territory of Arizona, and had in all respects complied with the laws of the state of California authorizing the plaintiff to do business therein.

2. That heretofore, to wit, on or about the month of January, 1902, the defendant was employed by the plaintiff as its agent and general manager of its business in Shasta County, California, and was placed in charge of plaintiff's office at Redding, in said county; that the duties of the defendant were to develop and promote certain mines owned by the plaintiff, to employ laborers and others for that purpose, receive and disburse the money of plaintiff in connection with its business, to keep accurate accounts and vouchers pertaining thereto, also from time to time to purchase for the plaintiff mining properties in the state of California; that defendant accepted said employment and undertook to carry on the business of the plaintiff as its agent and trustee, as aforesaid.

That the defendant during the period of said employment, extending from the aforesaid date up to about the 1st day of September, 1902, received from the plaintiff, as such agent and trustee, large sums of money from time to time, and was also intrusted with the duty of purchasing certain mining properties; and that, for the purpose of making such purchases, a large amount of money was placed in his hands for the purpose of being paid thereon. Plaintiff avers that the defendant, unmindful of his duties in the premises, and

¹ The sufficiency of this complaint (form No. 700), although not passed upon on appeal, was tested by demurrer in the trial court upon general grounds, and upon the special grounds that the same was uncertain, ambiguous, and unintelligible, and that it improperly united several causes of action, upon all of which grounds the court overruled the demurrer: From the record in *Great Western G. Co. v. Chambers*, 153 Cal. 307, 95 Pac. 151.

In a later appeal it was held that the facts alleged in this complaint are sufficient as declaring upon a cause of action arising upon the purchase by defendant as agent for and on behalf of the plaintiff: *Great Western Gold Co. v. Chambers*, 155 Cal. 364, 101 Pac. 6, 7.

with the intention and purpose of defrauding plaintiff, failed and neglected to keep accurate and proper books of account showing the amount of moneys received by him and the disbursements made, and failed and neglected to take proper vouchers and receipts for money expended, and alleges that defendant converted a large portion of said money to his own use.

That the plaintiff has made repeated demands upon defendant for the original books, papers, and vouchers pertaining to the business transactions by him for the plaintiff, but the defendant has wrongfully refused and neglected, and still refuses and neglects, to render proper accounts of his doings in the premises; that the accounts between plaintiff and defendant are complicated in their nature, and that, owing to the fact that all of the books and papers kept by the defendant are in his possession and under his control, the plaintiff is unable at this time to set out more particularly the matters and things hereinbefore referred to, but expects to show the same by the books and papers in the possession and under the control of said defendant, and make discovery thereof by said books and papers and the testimony of said defendant.

3. That heretofore, to wit, on or about the 1st day of September, 1902, the defendant was duly elected and qualified as vice-president and director of the plaintiff company; and also on or about the said date was duly appointed and constituted general manager of the business of plaintiff in the state of California, and that the plaintiff's property in said state was placed in his possession as agent and trustee for the plaintiff; [here follow averments to the same effect as the averments in the preceding paragraph relating to the duties of defendant as such director, receipts of money by him, misapplication of funds, and conversion of the same to his own use, etc.;] that on or about the 20th day of September, 1902, defendant, while acting as agent and trustee for the plaintiff as aforesaid, was directed to proceed to Salt Lake City, and there purchase for the plaintiff, or procure a contract therefor, a certain mine known as the Afterthought, in Shasta County, California, and procure the same as cheaply as possible, not paying more therefor than the sum of \$150,000; that the defendant, acting upon said instructions, and as the agent and trustee for the plaintiff, proceeded to Salt Lake City, and while there, for the purpose of cheating and defrauding the plaintiff in connection with the purchase of said mining claims,

entered into an agreement and conspiracy with one W. F. Snyder and one Mitchell, whereby the said Snyder was to take the title to said mines from one Tarbet for the sum of \$90,000, and that thereupon said Snyder was to get an approval contract for the purchase of said mines of the said tenor and effect to the plaintiff herein for the sum of \$150,000; that the plaintiff herein, without knowledge of said agreement and conspiracy, accepted the contract from said Snyder at the suggestion and direction of defendant, and paid thereon to said Snyder the sum of \$20,000 as the first payment, the balance of said \$150,000 to be paid as follows: \$90,000 on the 20th day of September, 1903; \$40,000 on the 20th day of March, 1904; that said Snyder, having received said money, paid \$10,000 upon the contract which he had previously made regarding the said property with said Tarbet, and that the remaining \$10,000 was divided between said Snyder, said Mitchell, and the defendant herein, and plaintiff is informed and believes, and so charges the facts to be, that defendant received a large portion thereof, the exact amount plaintiff is at this time unable to state, but expects to show the same and make discovery thereof by the books and papers in possession and under the control of said parties, and by the testimony of said parties; that owing to the aforesaid facts plaintiff is unable at this time to set forth more specifically said transactions; that thereafter this plaintiff paid upon said contract to the said Snyder the sum of \$110,000 in full payment and discharge of the same, making in all the sum of \$130,000 paid thereon; that thereby there was lost to this plaintiff, and plaintiff was damaged, by reason of said fraudulent agreement of conspiracy and acts upon the part of said defendant, in the full sum of \$40,000. [Here follow averments as to other purchases made by defendant in his capacity as said trustee, and of secret profits derived therefrom, and the fraudulent conversion of moneys representing said secret profits to defendant's own use, etc.]

That the plaintiff is informed and believes, and so charges the facts to be, that the defendant, during the period aforesaid, and while acting as the agent and trustee, director, vice-president, and general manager of the plaintiff company aforesaid, received and converted to his own use, in his capacities aforesaid, the sum of at least \$40,000.

Wherefore, plaintiff prays: That an accounting be ordered herein of all the matters and things hereinbefore set forth, and that the cor-

rect amount due from the defendant to the plaintiff upon said accounting be ascertained and settled, and a judgment be entered for plaintiff for the amount so ascertained to be due from the defendant to the plaintiff; and that the defendant be ordered and decreed to convey to the plaintiff and to assign to it any real estate in his possession and under his control belonging to the plaintiff, or to which the plaintiff may be entitled upon a hearing hereof, and also all contracts for the purchase of real estate entered into by the defendant in his own name for or on behalf of the plaintiff; and that all matters and things connected with the agency and trusteeship of the defendant while acting in that capacity for the plaintiff be settled, ascertained, and determined, and a decree entered therefor; and that plaintiff have judgment for costs herein, and for such other and further relief as to this court may seem just and equitable in the premises.

Bush & Perry,

[Verification.]

Attorneys for plaintiff.

FORM No. 701—By real estate agent, for commissions.

(In *Greenwood v. Burton*, 27 Neb. 808; 44 N. W. 28.)

[Title of court and cause.]

1. That on or about the 1st day of September, 1888, the plaintiff entered into the service of the defendant, G., at his request, as agent, to trade, exchange, and dispose of certain land described as follows: [Here described]; that plaintiff negotiated the sale of said land belonging to the defendant, G., upon the terms and conditions and at the time agreed upon and suggested by defendant.

2. That the purchaser procured by the plaintiff for the defendant's aforesaid land was then and there willing, ready, and able to complete the purchase of the defendant's real estate upon the terms and conditions fixed and agreed upon by the defendant with the plaintiff.

3. That the plaintiff has duly performed all the conditions of said contract on his part to be performed.

4. That defendant has not paid the plaintiff the said sum, or any part thereof, for the aforesaid services, and there is now due the plaintiff from the defendant therefor the sum of \$50, with interest on the same from September 1, 1888.

[Prayer, etc.]

A. B., Attorney for plaintiff.

FORM No. 702—By real estate agent, for commissions for sale executed.

(In Griffith v. Woolworth, 28 Neb. 715; 44 N. W. 1137.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on or about the day of , 19 , the defendant employed the plaintiff to find a purchaser for and to sell for the defendant certain real property, described as follows: [Here described], at a price and upon the terms stated and fixed by defendant, and defendant thereupon agreed to pay the plaintiff for his services, and as his compensation for finding such purchaser and making such sale, the sum of \$600.

2. That about the day of , 19 , this plaintiff found a purchaser, and sold to him for the defendant the said premises at the price and upon the terms stated and fixed by the defendant, and thereupon the defendant became indebted to the plaintiff in the sum of \$600 for said services of plaintiff in finding such purchaser and making said sale, and there is now due from the defendant to the plaintiff for said services, as his said compensation therefor, the sum of \$600, with interest from the day of , 19 .

[Concluding part.]

FORM No. 703—Upon special contract to protect agent in his right to commissions.

(In Myers v. Holton, 9 Cal. App. 114; 98 Pac. 197.)

[Title of court and cause.]

Comes now the plaintiff in the above-entitled cause, and complaining of the defendant, alleges:

1. That the plaintiff resides, and is engaged in the real estate business, in the city of Los Angeles, Los Angeles County, California.

2. That on the 27th day of July, 1905, D. Hutton, for a valuable consideration, executed and delivered to the plaintiff herein an option to purchase the land hereinafter referred to, together with certain other property, which said option is in the words and figures following, to wit: "Searchlight, Nev., July 27, 1905. I, D. Hutton, in consideration of \$1.00 do hereby give Lee R. Myers, or his assigns, an option to buy my Colorado River ranch, consisting of 160 acres desert claim, and 160 acres homestead claim, and one store and a business lot in Searchlight, Nevada, free and clear of encumbrance,

for a consideration of \$8,000 net to me. This option to be good for sixty days from this date. D. Hutton."

3. That thereafter, to wit, on the 1st day of August, 1905, the defendant, G. L. Holton, executed and delivered to the plaintiff, in the said city of Los Angeles, for a valuable consideration, the following agreement, to wit: "Los Angeles, Cal., August 1, 1905. This certifies that L. R. Myers, real estate agent, introduced us by letter to D. Hutton of Searchlight, Nevada, and that we, B. W. Gerhart and G. L. Holton, are to see Mr. D. Hutton and look at his Colorado River ranches with a view of buying the property. We agree to protect the said L. R. Myers in the matter of his commission, if we, or our assigns, purchase the said property. G. L. Holton."

4. That thereafter, to wit, on or about the 1st day of September, 1905, the defendant and the said D. Hutton entered into an agreement of sale wherein the said Hutton agreed to sell to the defendant the property referred to in the foregoing instruments, and the defendant is now in the possession of the said property under said agreement, and is now, with the said Gerhart, the owner of the said property.

5. That the agreed purchase price of the said property was the sum of \$12,000, of which the sum of \$8,000 was to be paid to the said D. Hutton and the remaining \$4,000 was to be paid to the plaintiff.

6. That plaintiff is informed and believes, and upon such information and belief alleges, that the said sum of \$8,000, to be paid as aforesaid to said D. Hutton, has been paid.

7. That the said sum of \$4,000, to be paid to plaintiff as hereinbefore alleged, has not been paid, nor any part thereof, except the sum of \$500; and that the sum of \$3,500, to be paid by the defendant to the plaintiff, remains wholly due, owing, and unpaid.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$3,500, and for costs of suit.

[Verification.]

Andrew G. Park, and
Theodore Park,
Attorneys for plaintiff.

§ 339. ANSWERS.**FORM No. 704—Defense denying agency.**

[Title of court and cause.]

[After introductory part:]

For a separate defense against the complaint of plaintiff herein, defendant denies that _____, the party alleged in said complaint to have executed said deed [or other instrument], was defendant's agent for any purpose, or that said _____ had authority to make or execute or deliver any deed [or other instrument] conveying any right, title, or interest in or to the property described in the complaint herein.

[Prayer, etc.]

C. D., Attorney for defendant.

[Verification.]

FORM No. 705—Defense based upon special contract as to commissions.

(In *Beatty v. Russell*, 41 Neb. 321; 59 N. W. 919.)

[Title of court and cause.]

[After introductory part:]

Defendant denies that he employed the plaintiff to sell the land referred to in said petition, but avers the fact to be that the firm of G. & B., composed of G. H. G. and the plaintiff, as partners, were employed to sell said farm upon the terms that the defendant was to receive \$4,800 clear of all commissions for the land, and the said G. & B. were to have all over said \$4,800 as their commission; and if they sold the land for only \$4,800 they were to have no commission from the defendant. Defendant further avers that said land was sold for \$4,800, and no more, and therefore no commission whatever is due the plaintiff.

[Prayer, etc.]

C. D., Attorney for defendant.

FORM No. 706—Defense including counterclaim for damages for disobeying principal's orders in regard to stock transactions.

(In *Galigher v. Jones*, 129 U. S. 193; 9 Sup. Ct. 335; 32 L. ed. 658.)

[Title of court and cause.]

[After introductory part:]

1. That plaintiff is a banker at Salt Lake City, and that the defendant has had for two years last past an account with him as such; that the plaintiff, at the defendant's request, and as his agent, bought, or caused to be bought, at the Mining Stock Exchange Board

of San Francisco, California, certain mining stocks for and on account of this defendant, and at various times thereafter in 1877 and 1878, on the order and at the direction of this defendant, and as his agent aforesaid, bought and sold mining and other stocks up to about the date of the filing of said complaint; that at divers times during and between the dates above specified this defendant paid into plaintiff's bank sums of money on account of said purchases, and to the credit thereof, and which were so applied by plaintiff on defendant's order.

2. Defendant denies that at the date of the filing of the complaint the sum of five thousand dollars, or any sum, was due to the plaintiff on said account, or on any account, for loans or advances from plaintiff to defendant. Defendant alleges that it was agreed between the plaintiff and this defendant, in the transaction of the business of purchases of said stock by the plaintiff, that the same were made on defendant's credit, and that said stock was bought, and was to be held, subject to defendant's order at all times, this defendant agreeing to pay said plaintiff commissions for his services as agent and an agreed rate of interest on any advances he might make; that at no time had the plaintiff any authority to either buy or sell stock on defendant's account except by his order.

And by way of counterclaim the defendant alleges:

1. That on the 13th day of November, 1878, being at Virginia City, he ordered the plaintiff, who was then at Salt Lake City, by telegraphic dispatch, to sell certain mining stocks then in his hands as defendant's agent, to wit, 320 shares of Justice stock, worth \$9 per share; 50 shares of Alta stock, worth \$8 per share; 200 shares of Tip Top stock, worth \$1.60 per share; and to invest the proceeds in North Bonanza stock, another mining stock on the same board, and which the defendant had been investigating; that the plaintiff received this dispatch in ample time to make the transaction as directed on that day, but refused and neglected to do so; that the defendant relied on its being done, and agreed with another party to sell the stock he had ordered purchased; that the plaintiff did not give notice to the defendant of his refusal to comply with said order until several days afterwards, and then by letter; that afterwards, and without any order or orders so to do, the plaintiff sold said Alta stock at \$7.75 per share, said Justice stock at \$4.40 per share, and said Tip Top stock at \$1.25 per share, making a net loss to defendant of \$1,200; that the said North Bonanza stock was worth more than \$2 per share

on the said date, and that within five days thereafter it advanced to \$5.60 per share, which latter amount per share the defendant would have realized if plaintiff had complied with said order, whereby the defendant, through said disobedience of orders in regard to said last-named stock, lost the sum of \$6,125.

Defendant further alleges, that in the month of November, 1878, the plaintiff, as defendant's agent, held for defendant 600 shares of the mining stock known as Challenge stock, and, without his consent, on the 27th and 29th of said month of November, sold the same for his, the plaintiff's, own use, to the damage of defendant in the sum of \$2,850.

3. That on the 22d day of November, 1877, the plaintiff held for the defendant, as his agent as aforesaid, 50 shares of mining stock known as Ophir stock, worth at that date \$37.50 per share, and on that day represented to defendant that he had sold said stock for defendant, and so reported to him, when in fact he had not sold said stock, but continued to hold the same, and afterwards sold it for \$100 per share, the advance amounting to \$3,125, which is justly due from the plaintiff to the defendant.

[Prayer, etc.]

C. D., Attorney for defendant and counterclaimant.

[Verification.]

Form of complaint in an action by a broker for commissions: *Rogers v. Duff*, 97 Cal. 66, 67, 31 Pac. 836.

Form of findings of fact and of law in an action to recover commission for the sale of land, by the plaintiff, who procured a purchaser in compliance with the terms of a contract made with the defendant: *Robinson v. Kindley*, 36 Kan. 157, 12 Pac. 587.

§ 340. ANNOTATIONS.—Agency.

1. Distinction between contract to find purchaser and contract to sell.
2. Parol contract to find purchaser.
3. Oral offer to buy.
4. Formal tender of purchase price.—When unnecessary.
5. Action to recover commission.—Complaint held sufficient.
6. Agency.—When admitted by the pleadings.
7. Departure by agent from his authority.
- 8, 9. Ratification by municipal corporation of unauthorized agent's acts.—Pleading ratification.
10. Agent suing alone.

1. Distinction between contract to find purchaser and contract to sell.—A distinction is made between the cases where the plaintiff's employment was merely to find a purchaser and cases where the employment was to sell. In

Jury's Pl.—85.

the following cases the right of the agent to his commissions on finding a purchaser ready, willing, and able to purchase was upheld: *Finnerty v. Fritz*, 5 Colo. 174; *Smith v. Fairchild*, 7 Colo. 510, 4 Pac. 757; *Buckingham v. Harris*,

10 Colo. 455, 15 Pac. 817, 818; *Nellson v. Lee*, 60 Cal. 555; *Betz v. Williams & White L. & L. Co.*, 46 Kan. 45, 26 Pac. 456, 457; *Neiderlander v. Starr*, 50 Kan. 772, 33 Pac. 592, (reversing in effect *Stewart v. Fowler*, 37 Kan. 677, 15 Pac. 918); *Stewart v. Fowler*, 53 Kan. 537, 36 Pac. 1002, (modifying former decision in 37 Kan. 677, 15 Pac. 918, holding that the language in the original decision should be modified and limited, and that where, at the time of the sale, the purchaser was willing and able to carry out the contract, the subsequent default in the payment of a portion of the purchase price would not deprive the agent of the right to his commissions); *Bell v. Kaiser*, 50 Mo. 150; *Hart v. Hoffman*, 44 How. Pr. 168; *Moses v. Blerling*, 31 N. Y. 462; *Lloyd v. Matthews*, 51 N. Y. 124; *Mooney v. Elder*, 56 N. Y. 238; *Doty v. Miller*, 43 Barb. N. Y. 529; *Fisk v. Henarie*, 13 Ore. 156, 9 Pac. 322; *Dela-plain v. Turnley*, 44 Wis. 31. In the following, the right of the agent to the commissions depended upon a consummated sale under agreement with the owner: *Helling v. Darby*, 71 Kan. 107, 79 Pac. 1073, 1074, (where buyer and seller were not brought together by the agent).

2. Parol contract to find purchaser.—A parol contract is sufficient for the employment of a real estate agent to find a purchaser ready, able, and willing to purchase, and such contract is not within the statute of frauds: *Long v. Thompson*, 73 Kan. 76, 84 Pac. 552, (to recover commissions for finding proposed purchaser).

3. Oral offer to buy.—When an agent under an authority to sell finds and brings to the owner a party ready, able, willing, and anxious to buy, and who orally offers in good faith to buy at the owner's price, named in the written contract, the agent is entitled to his commission as agreed: *Carlin v. Lifur*, 2 Cal. App. 590, 592, 84 Pac. Rep. 292, (to recover commission on sale of real property).

4. A formal tender of the price is unnecessary until the owner should evince some disposition to accept it: *Carlin v. Lifur*, 2 Cal. App. 590, 592, 84 Pac. 292, (to recover commission on sale of real property).

5. Action to recover commission.—Complaint held sufficient.—The follow-

ing averments in the pleading in an action by an agent to recover commission from the owner of property for finding a purchaser ready, willing, and able to purchase have been held sufficient as stating a cause of action.

After preliminary averments, the petition reads:

"(2) That on or about the day of July, 1902, defendant employed plaintiffs to procure a purchaser for certain tracts of land owned by him and situate in the counties of Elk and Cowley, in the state of Kansas, for the sum of \$7,300, and defendant then and there promised and agreed to pay to the plaintiffs the sum of \$300 for procuring a purchaser at the sum aforesaid, said sum to be paid upon such terms and in such manner as could be mutually agreed upon by the purchaser so procured by the plaintiffs and the defendant.

"(3) That in pursuance of the said agreement, verbally had between the plaintiffs and the defendant, the plaintiffs procured a purchaser for the defendant's lands and took such purchaser to the defendant, and such purchaser so as aforesaid procured by the plaintiffs for the defendant's said lands and the defendant then and there agreed upon the sale of the said lands for the aforesaid sum of \$7,300, and agreed upon the times and terms of the payment thereof, and that said purchaser was ready, able, and willing to pay the said price for the said lands. Said agreement of sale between the purchaser so as aforesaid procured and said defendant, as to the price of the said lands and the terms of payment for the same, being verbal," etc.: *Long v. Thompson*, 73 Kan. 76, 84 Pac. 552, (to recover commissions for finding proposed purchaser).

6. Agency.—When admitted by the pleadings.—A direct averment in the complaint, not denied by the answer, in effect that at the time of the execution of a chattel mortgage the party making the certificate was duly authorized to act in regard thereto as an agent of the mortgagee, is sufficient to show agency: *San Francisco Breweries v. Schurtz*, 104 Cal. 420, 428, 38 Pac. 92.

7. Departure by agent from his authority.—A departure by a real estate broker from the terms of his authority in effecting a sale, becomes, on ratification by the principal, a part of the original

contract, and the compensation fixed therein governs, and the broker is entitled to recover in accordance therewith: *Levy v. Wolf*, 2 Cal. App. 491, 494, 84 Pac. 313.

For a case in which the issue of authority of an agent was raised by the pleadings, see *Wales v. Mower*, 44 Colo. 146, 96 Pac. 971.

8. Ratification by municipal corporation of unauthorized agent's acts.—A municipal corporation's act done through an unauthorized agent must be ratified in the manner in which original authority could have been conferred: See *McCracken v. San Francisco*, 16 Cal. 591; *Grogan v. San Francisco*, 18 Cal. 590; *People v. Swift*, 31 Cal. 26, 28.

9. Pleading the ratification is, however, unnecessary. It is sufficient to allege the execution by the defendant of the instrument upon which suit is brought, and which he has ratified: *Porter v. Lassen Co. L. & C. Co.*, 127 Cal. 261, 271, 59 Pac. 563.

10. Agent suing alone.—An agent contracting in his own name for the benefit of his principal, the agency being known, may sue in his own name without joining his principal as a party plaintiff: *Salmon v. Hoffman*, 2 Cal. 138, 56 Am. Dec. 322; *Ord v. McKee*, 5 Cal. 515; *Winters v. Rush*, 34 Cal. 136. See *Weaver v. Trustee & W. E. Canal*, 23 Ind. 112; *Rice v. Savery*, 22 Iowa 470; *Wright v. Tinsley*, 30 Mo. 389; *Cheltenham Fire Brick Co. v. Cook*, 44 Mo. 29; *Considerant v. Brisbane*, 22 N. Y. 389; *Noe v. Christy*, 51 N. Y. 270; *Hubbell v. Medbury*, 53 N. Y. 98.

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§ 341. COMPLAINTS [OR PETITIONS].

FORM No. 707—Upon fire insurance policy. (Common form.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant is a corporation duly created by and under the laws of the state of , organized pursuant to an act of the legislature of said state, entitled [give title of act], passed [give date of passage], and the acts amendatory thereof.

2. That on the day of , 19 , the plaintiff being the owner of a dwelling-house and furniture therein in Street, in the city of , in consideration of the premium of \$, the defendant, by its policy of insurance in writing, a copy of which is hereto annexed, marked "Exhibit A," and made a part hereof, insured the plaintiff against loss or damage by fire to the amount of \$ on said property, from the day of , 19 , at 12 o'clock noon, until the day of , 19 , at 12 o'clock noon.

3. That the plaintiff has duly performed all the conditions on his part to be performed; that on the day of , 19 , said dwelling-house and furniture were totally destroyed [or greatly damaged, stating the extent thereof] by fire, which did not happen by [any of the causes excepted in the policy].

4. That the plaintiff's loss thereby was \$.

5. That the plaintiff immediately thereafter, on the day of , 19 , notified the defendant of said loss, and on the day

of , 19 , and more than days prior to this action, furnished the defendant with due proof of said loss.

6. That no part of said loss has been paid, and the whole of said sum is now due thereon from the defendant to the plaintiff.

[Concluding part.]

FORM No. 708—By mortgagee as assignee of the policy.

[Title of court and cause.]

[As in preceding form to fifth paragraph, substituting the original insured's name for the word "plaintiff."]

5. That on the day of , 19 , the said insured executed and delivered to the plaintiff his mortgage on said premises, to secure the sum of \$, and assigned said policy to the plaintiff as further security, and thereupon the defendant, at the request of the plaintiff and of the insured, endorsed on said policy, "Loss, if any, payable to [plaintiff] as his interest may appear."

6. That said mortgage and the debt secured thereby is wholly unpaid and unsatisfied.

[Continue as in preceding form, averring performance of conditions, giving of notice, and proofs of loss by the original insured.]

[Concluding part.]

FORM No. 709—Upon fire insurance policy.—Total loss.

(In *Clayburg v. Agricultural Ins. Co.*, 155 Cal. 708; 102 Pac. 812.)

[Title of court and cause.]

Plaintiff complains of defendant, and alleges:

1. That defendant now is, and at and during all the times hereinafter stated was, a body corporate, duly created, formed, and organized under the laws of the state of New York.

2. That on, to wit, the 8th day of March, 1905, at the city and county of San Francisco, state of California, defendant, in consideration of the payment to it by plaintiff of the sum of \$60.60, did then and there execute and deliver to plaintiff, its certain policy of insurance in writing, a copy whereof is annexed hereto, marked "Exhibit A,"¹ and made a part of this complaint, and in and by which said

¹ Exhibit A to the foregoing form No. 709 (action upon an insurance policy) is a copy of said policy. The policy contains the following clause, which was the subject of much litigation over the losses from the great San Francisco fire, April 18 to April 21, 1906, and upon which the defenses to the actions instituted upon policies were generally based. The clause referred to is as follows: "If a building or any part thereof fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

defendant did insure plaintiff for the term of one year from the 23d day of April, 1905, at noon, to the 23d day of April, 1906, at noon, against all loss or damage by fire except as in said policy provided, to an amount not exceeding \$6,000, on the property described in the slip attached to said policy, which slip was then and there attached to said policy, and is in words and figures as follows, to wit: [Here follows copy of said slip set out in haec verba, describing the property insured, its location, and granting permission to make alterations, repairs, to use electric power, and to effect other insurance.]

3. That on said 8th day of March, 1906, and at the time of the execution and delivery of said policy of insurance, and continuously thereafter, up to and including the time of the fire hereinafter mentioned, plaintiff was the owner in fee-simple of the ground on which the building described in said slip was erected, and plaintiff at and during all said times was the sole owner of said brick building and of all the property described in and insured by said policy of insurance.

4. That at and during all said times, said building was occupied as an art store, and was known and designated as No. 113 Geary Street, in said city and county.

5. That on the 19th day of April, 1906, all the property described in and insured by said policy of insurance was totally destroyed by fire; that the destruction of said property was by fire direct, and was not caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after the fire, or by explosion of any kind, or by lightning, or by any cause or causes which by the terms of said policy of insurance are excepted therefrom.

6. That the building described in said policy and every part thereof fell as the result of said fire, and that the fall of said building and every part thereof was caused solely by said fire.

7. That the loss of plaintiff by said last-mentioned fire to said insured property was \$55,159; that at the time of said fire the aggregate amount of insurance upon the property insured by said policy was \$30,000 and no more.

8. That on the 4th day of June, 1906, at the city and county of San Francisco, state of California, plaintiff delivered to defendant a veri-

fied proof of loss in writing of his said loss and interest in said property so destroyed as aforesaid, and did in all matters and things fully and completely perform all the conditions of said policy on the part of the insured to be kept and performed.

9. That more than sixty days have elapsed since delivery to defendant of said verified proof of loss; that said defendant has not notified plaintiff of any objections to said proof of loss, and no disagreement has arisen between plaintiff and defendant as to the amount of plaintiff's loss; but defendant has failed and refused to adjust plaintiff's loss unless plaintiff would agree in advance to accept from defendant, in full of plaintiff's said claim, a sum materially less than the proportion of said loss for which defendant is liable under said policy; that the proportion of the loss of said insured property payable by defendant under its said policy of insurance is the sum of \$6,000; that defendant has refused to pay its proportion of said loss to plaintiff, although demand therefor has been made; that the amount owing by defendant to plaintiff for the loss as aforesaid sustained by plaintiff to the property insured by defendant under its said policy of insurance is the sum of \$6,000, all of which is due and unpaid.

Wherefore, plaintiff prays judgment against defendant for the sum of \$6,000, with interest at the rate of seven per cent per annum from the 4th day of August, 1906, and for costs of suit.

Naphtaly & Freidenrich,

[Verification.]

Attorneys for plaintiff.

FORM No. 710—Upon fire insurance policy.—With averments as to waiver of written statement.

(In *McCollough v. Home Ins. Co. of N. Y.*, 155 Cal. 659; 102 Pac. 814.)

[Title of court and cause.]

Comes now C. M. McCollough, the plaintiff herein, and by leave of court first had and obtained, files this, his amended complaint, and for cause of action against the defendant herein alleges:

1. That the defendant is a corporation, organized and existing under the laws of the state of New York, and licensed and empowered to transact business in its special line in the state of California.

2. That heretofore, to wit, on the 31st day of July, 1905, the plaintiff was the owner of, and used and occupied as a dwelling-house only, that certain building located on the southwest corner of Villa and

Diller streets, in the town of Watts, county of Los Angeles, state of California, together with certain household furniture, wearing apparel, family stores, books, pictures, silver and plated ware, musical instruments, and other personal effects, therein contained and located, and was the owner thereof during all the time since said 31st day of July, 1905, and up to and at the time of the destruction of all said property by fire, as hereinafter mentioned, and during all of said time continuously used and occupied said building only as a dwelling-house.

That before said contract and policy of insurance was entered into between this plaintiff and defendant, and before said policy was issued by the defendant, this plaintiff fairly stated and disclosed to the defendant and to its agent the nature and character of the interest of plaintiff to and in the lot and parcel of land upon which said building was located, and then and there stated and disclosed to the defendant and its agent that plaintiff had purchased said real estate under a contract of sale from the Golden State Realty Company, a corporation, with its principal place of business in the city and county of Los Angeles, and was then paying the purchase price therefor in instalments, and that there was then due on said purchase price the sum of about \$200, and that he, the plaintiff, did not at that time have a deed to said property; that thereupon said defendant and its agents issued and delivered to this plaintiff its said policy of insurance covering the said property therein described, the same being the property herein set forth; that before said fire, and before said loss occurred, this plaintiff fully paid the balance due on the said purchase price of said real estate to said Golden State Realty Company, and obtained a deed to said property; that plaintiff has at no time since said policy was issued, as aforesaid, parted with any of his right, title, or interest to or in said property, but has at all times been the sole and exclusive owner thereof, except as aforesaid.

3. That on the 31st day of July, 1905, at the city of Los Angeles, state of California, in consideration of the payment by the plaintiff to the defendant of the premium of \$46, which was received and accepted by defendant as aforesaid, made and delivered to plaintiff its policy of insurance in writing, covering all of the foregoing and above-mentioned and described property, a copy of which said policy is annexed to plaintiff's first amended complaint in this action, as "Exhibit A," and said exhibit A is made a part hereof by stipulation of the parties hereto.

4. That on or about the 1st day of June, 1906, said dwelling-house and said furniture, stores, wearing apparel, family stores, books, pictures, silver and plated ware, musical instruments, and other personal effects therein contained, all of which were included in, and comprehended and covered by, said policy, were totally destroyed by fire.

That the plaintiff's loss on account of the destruction by fire of said dwelling-house, the said furniture, stores, wearing apparel, books, wares, pictures, musical instruments, and other personal effects, included in and covered by said policy, was the sum of \$5,564.50, the same being the actual and reasonable cash value of said property at the time of its destruction by fire, as aforesaid.

6. That on or about the 4th day of June, 1906, this plaintiff gave to the defendant full and complete oral items and proof of his said loss on said property, and at said time rendered an oral statement to said company, stating the knowledge and belief of plaintiff, the said insured, as to the time and origin of said fire, and the interest of said insured and all others in said property, the cash value of each item thereof, and the amount of loss thereon, stating that there was no other insurance on said property, and giving all changes in the title, use, occupation, location, possession, and exposure of said property since the issuance of said policy, and by whom and for what purposes the said building and parts thereof were occupied at the time of said fire; that defendant did not require said notice and said statement to be in writing, but then and there expressly waived said requirement, and then and there expressly waived written notice of loss, and then and there expressly waived a written, signed, and sworn statement, of the character aforesaid, in the manner and as follows, to wit: That defendant represented to, informed, and told plaintiff that defendant would not ask, require, or expect plaintiff to furnish said notice and said statement in writing, signed, and under oath, but that defendant was satisfied with the notice and statement then given and rendered by plaintiff as aforesaid; and defendant further represented and said to plaintiff that a written, signed, and sworn statement made no difference to defendant, as it intended to settle plaintiff's said loss with him in any event; that more than sixty days elapsed after giving said notice, and after rendering said statement aforesaid, and after ascertaining, estimating, and giving satisfactory proof as aforesaid of said loss, before the commencement of this action; that plaintiff has otherwise performed all the conditions of said policy to be performed by him.

7. That on the 28th day of August, 1906, plaintiff furnished to said defendant, at its special instance and request, additional and supplemental proof of plaintiff's said loss and interest of and in said property, in writing.

8. That after said fire, and before the commencement of this action, the plaintiff at divers times made demand on said defendant for payment of his said loss, according to the terms of said policy, in the sum of \$3,000, but the defendant refused, and still refuses, to pay the same.

9. That the defendant has not paid said loss, or any part thereof, and the same is now due, owing, and unpaid.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$3,000, as provided for in said policy, and that plaintiff be given judgment for his costs, and for all other proper relief in the premises to which he may be entitled.

C. W. Pendleton,

Attorney for plaintiff.

[Verification.]

FORM No. 711—On agreement to insure and give policy.

[Title of court and cause.]

[After introductory part:]

1. [Allege incorporation of defendants.]

2. That on the day of , 19 , the plaintiff applied to L. M., who was then and there the duly authorized agent of the defendants, for insurance against loss or damage by fire upon [describe what], the property of said plaintiff, and the defendants, by their said agent, in consideration of a premium of \$, to be paid them by the plaintiff, agreed to insure the plaintiff on the said [state what] from 12 o'clock noon of said day for the space of months, and to execute and deliver to the plaintiff within a reasonable and convenient time their policy of insurance therefor in the usual form of policy issued by them.

3. That the usual form of policy issued by the defendants agrees, among other things, to [set out legal effect of contemplated policy].

4. That afterward, to wit, on the day of , 19 , the said property was damaged [totally destroyed] by fire, whereby the plaintiff sustained a loss to the amount of \$.

5. That the defendants neglected and refused, and still refuse, to execute and deliver their said policy of insurance in writing to the plaintiff in pursuance of said agreement.

6. That the plaintiff has duly performed all the conditions of said agreement and insurance on his part to be performed, and on the day of , 19 , notified the defendants of said loss, and on the day of , 19 , duly furnished the defendants with proofs of loss.

7. That although more than days have elapsed since said proofs were furnished, no part of said loss has been paid, and the whole thereof remains due and payable to the plaintiff.

[Concluding part.]

FORM No. 712—Action by executor on life policy.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. [Allegation of incorporation.]

2. That on the day of , 19 , at , in consideration of the payment of the premium of \$ annually [or otherwise] during life, the defendants, by their agents duly authorized thereto, executed their policy of insurance in writing to one L. M. on his life, in the sum of \$, a copy of which policy is hereto annexed, marked "Exhibit A," and made a part of this complaint [or petition].

3. That on the day of , 19 , at , said L. M. died [but not by his own hands, or at the hands of justice, etc.,—if such causes be excepted], having previously, and on the day of , 19 , made his last will and testament in due form, thereby appointing the plaintiff sole executor thereof.

4. That said last will and testament was duly proved and admitted to probate in the probate court of the county of , and letters testamentary thereupon, by an order of said court therein duly given and made in said proceeding, were issued to this plaintiff on the day of , 19 , and the plaintiff thereupon duly qualified as such executor, and entered upon the discharge of the duties of his said office.

5. That on the day of , 19 , the plaintiff furnished the defendant with proofs of the death of the said L. M., and that the said L. M. and the plaintiff each duly performed all the conditions of said policy of insurance on his part.

6. That no part of the said sum has been paid, and that the whole thereof is now due thereon from the defendants to the plaintiff, as such executor.

[Concluding part.]

FORM No. 713—Action by assignee in trust for wife of insured.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. [Allegation of incorporation.]

2. That on the day of , 19 , at , in consideration of the payment of the premium of \$ annually [or otherwise] during life, the defendants, by their agents duly authorized thereto, executed their policy of insurance in writing to one L. M. on his life, in the sum of \$, a copy of which policy is hereto annexed, marked "Exhibit A," and made a part of this complaint [or petition].

3. That on the day of , 19 , the said L. M. [with the written consent of the defendants] duly assigned said policy of insurance to this plaintiff, in trust for E. M., his wife.

4. That up to the time of the death of said L. M. all premiums accrued upon said policy were fully paid.

5. That on the day of , 19 , at , said L. M. departed this life [but not by his own hands, or at the hands of justice, etc.,—if such be excepted causes of death].

6. That said L. M. and the plaintiff each performed all the conditions of said insurance on his part, and the plaintiff, more than days before the commencement of this action, to wit, on the day of , 19 , gave to the defendants notice and proofs of the death of said L. M. as aforesaid, and demanded payment of the said sum of \$.

7. That said sum has not been paid, nor any part thereof, and the same is now due thereon from the defendants to the plaintiff.

[Concluding part.]

FORM No. 714—Action by wife, partner, or creditor of insured.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. [Allegation of incorporation.]

2. That on the day of , 19 , at , in consideration of the payment by the plaintiff to the defendants of the [annual] premium of \$, the defendants executed to the plaintiff their policy of insurance upon the life of [her husband] L. M., of which a copy, marked "Exhibit A," is hereto annexed as a part of this complaint [or petition], and thereby insured the life of said L. M. in the sum of \$, payable to the plaintiff.

3. That the plaintiff had a valuable interest in the life of the said L. M. at the time of his death, and at the time of effecting the said insurance. [State nature of the interest.]

4. That on the day of , 19 , at , the said L. M. died [but not by his own hands, or at the hands of justice, etc.], and on the day of , 19 , the plaintiff furnished the defendants with proofs of the death of said L. M., and otherwise performed all the conditions of the said policy on [her] part.

5. That no part of the same has been paid, and the said sum is now due thereon from the defendants to this plaintiff.

[Concluding part.]

FORM No. 715—Interpleader to determine beneficial interest in life insurance policy.

(In Grand Lodge A. O. U. W. v. Miller, 8 Cal. App. 25; 96 Pac. 22.)

[Title of court.]

The Grand Lodge Ancient Order
of United Workmen of Wash-
ington, a corporation, plaintiff,

v.

Ida Miller, and Mark A. Miller,
her husband, and Ada Baptist,
and Joseph Baptist, her hus-
band, and Ada Baptist, execu-
trix of the last will of Matilda
F. Peacock, deceased, defend-
ants.

Comes now the plaintiff, and for cause of action complains and alleges:

1. That the plaintiff, Grand Lodge Ancient Order of United Workmen of Washington, is a fraternal beneficiary order, organized and incorporated under the laws of the state of Washington, and authorized to do business in the said state.

2. That the defendants John Doe Miller, whose true Christian name is to the plaintiff unknown, and Ida Miller are husband and wife; that the defendants Richard Roe Baptist, whose true Christian name is to the plaintiff unknown, and Ada Baptist are husband and wife; and that said marital relations existed at all the times hereinafter mentioned; that Ada Baptist is the administratrix of the estate of Matilda Peacock, deceased.

3. That on the 23d day of July, 1892, one William Peacock, being then a resident of the state of Washington, became a member of one of the subordinate lodges of plaintiff and the holder of a beneficiary certificate, by the terms of which the plaintiff agreed to pay to the beneficiary of said William Peacock, upon proof of the latter's death, the sum of \$2,000.

4. That the said William Peacock designated as his beneficiary under said beneficiary certificate Matilda Peacock, bearing the relation to him of wife.

5. That the said William Peacock paid all dues and assessments levied against him by plaintiff until the 18th day of April, 1906, when he and his wife, Matilda Peacock, were both instantly killed in the great earthquake disaster of that date, at Santa Rosa, Sonoma County, California; and that there immediately became due from this plaintiff to the beneficiaries of the deceased William Peacock, upon their filing proof of death, the sum of \$2,000.

6. That the said William Peacock left surviving him his daughter, Ada Baptist, who was also the daughter of Matilda Peacock, deceased; and the defendant Ida Miller, who was a daughter of said William Peacock by a former wife; that said William Peacock left no other child or children, or issue of any or other child or children.

7. That section 15 of article V of the constitution of the plaintiff, reads as follows: "Sec. 15.—Order of payment to beneficiaries. If one or more of the beneficiaries shall die during the lifetime of a member, the surviving beneficiary or beneficiaries shall be entitled to the benefit equally, unless otherwise provided in the beneficiary certificate, and if all the beneficiaries shall die during the lifetime of the member, and he shall have made no other direction, the benefit shall be to his widow, if living at the time of his death; if he leave no widow surviving him, then said benefit shall be paid share and share alike to his children, his grandchildren living at the time of his death to take the share to which the deceased parent would be entitled, if living; if there be no children or grandchildren of the deceased member living at the time of his death, then said benefit shall be paid to his mother, if living; and if she be dead at the time of his death, then to his father, if living; and if he be dead at the time of his death, then to his sister or sisters, share and share alike; and if he has no sisters living at the time of his death, then to his brother or brothers, share and share alike; and should there be no one living

at the death of the member entitled to said benefit under the provisions hereof, then the same shall revert to the beneficiary fund of the grand lodge.”

8. That upon proof of the death being filed with the plaintiff, it caused to be issued and sent to be delivered to Ada Baptist and Ida Miller, each as beneficiary of William Peacock, deceased, a draft in the sum of \$1,000, and one payable to Ada Baptist and one payable to Ida Miller; that Ada Baptist accepted the draft payable to her, and cashed the same; that the draft payable to Ida Miller was, through a mistake of plaintiff's agent, delivered to Ada Baptist, who claimed the same as the property of the estate of Matilda Peacock, deceased.

9. That the defendants Ida Miller and Ada Baptist claim, and each of them claims, the remaining \$1,000, as does also Ada Baptist as administratrix of the estate of Matilda Peacock, deceased; and the plaintiff can not safely pay the same to either of said claimants without an adjudication of the rights of defendants, and plaintiff has been obliged to employ attorneys for that purpose.

10. That the plaintiff herein pays into the clerk of said court the said sum of \$1,000.

11. Wherefore, plaintiff prays: That the rights of the defendants in and to the above-mentioned \$1,000 be determined, and that the plaintiff be relieved from any and all liability on account of the beneficiary certificate issued to the said William Peacock, deceased; that the plaintiff be absolved and adjudged free from all costs in this action; and for such other and further relief as to the court may seem meet and proper, and for an allowance of attorneys' fees out of said \$1,000.

Louis F. Hart, and

A. A. Sanderson,

Attorneys for plaintiff.

[Verification.]

FORM No. 716—Action on a valued marine policy.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That the defendant was at all the times hereinafter mentioned, and now is, a corporation created, organized, and existing under the laws of the state of .

2. That on the day of , 19 , in consideration of the premium of \$, paid to the defendant by the plaintiff, the

defendant made to the plaintiff a policy of insurance in writing, upon the ship described in the said policy, which policy is in the words and figures following, to wit: [Insert copy, or annex, and refer to the same as an exhibit.]

3. That said ship was then lying at the port of , preparing for a voyage from said port to in .

4. That on the day of , 19 , the said ship sailed from said port of on the voyage described in said policy, and while proceeding thereon was by the perils of the sea wrecked and totally lost. [Or state other cause of loss.]

5. That the plaintiff was, at the time of the risk, and thereafter, until said loss, the owner of said ship, and was interested therein to an amount exceeding \$, namely, in the sum of \$, which was the value of said ship.

6. That plaintiff duly performed all of the conditions of said policy on his part, and after said loss and destruction of said ship, he gave, on the day of , 19 , to the defendant notice and proof of said loss and destruction, and demanded of defendant said sum of \$, the amount of said insurance money; but the defendant has not paid said money nor any part thereof, and the whole thereof remains due and unpaid from the defendant to plaintiff.

Wherefore, plaintiff prays judgment against defendant for said sum of \$, and interest thereon from the day of , 19 , and plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 717—Complaint on open marine policy.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That at all the times hereinafter mentioned the defendant was, and now is, a corporation created, organized, and existing under the laws of .

2. That on the day of , 19 , in consideration of the premium of \$ paid to it by the plaintiff, the defendant made to plaintiff a policy of insurance in writing, in the words and figures following, to wit: [Insert copy, or, if preferred, annex, and refer to the same as an exhibit.]

3. That the ship on which said insured property was laden [or was

about to be laden] was then lying at the port of , preparing for a voyage from said port to in .

4. That plaintiff was at the time of the commencement of the risk, and at the time of the loss hereinafter mentioned, the owner of the property described in said policy, insured as aforesaid [or the special interest therein insured], and that plaintiff's said interest in said property exceeded the sum of \$; that the value of said insured property laden on said ship was, when laden, and until the loss thereof hereinafter alleged, \$.

5. That on the day of , 19 , the said ship sailed from said on the voyage described in the policy, and while proceeding thereon all of said insured property so laden on said ship [or the special interest of plaintiff therein insured] was destroyed by the perils of the sea [or state any other cause of loss insured against], to the loss of plaintiff in the sum of \$.

6. That plaintiff duly performed all of the conditions of said policy on his part, and on the day of , 19 , he gave to defendant notice and proof of said loss, and demanded of the defendant the sum of \$, the amount of said insurance money, but the defendant has not paid the same, nor any part thereof, and the whole thereof is due and unpaid from the defendant to the plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$, and interest thereon from the day of , and plaintiff's costs of suit. A. B., Attorney for plaintiff.

[Verification.]

FORM No. 718—On vessel lost by perils of the sea.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. [Averment of incorporation of defendant.]

2. That he was the owner of [or had an interest in] the ship [naming the same] at the time of its insurance and loss, as hereinafter mentioned.

3. That on the day of , 19 , at , the defendant, in consideration of \$ to it paid [or which the plaintiff then promised to pay], executed and delivered to the plaintiff a policy of insurance upon the said ship, a copy of which is hereto attached, marked "Exhibit A," and made a part of this complaint. [Or, whereby it promised to pay to the plaintiff, within days after

proof of loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the said ship during its next voyage from to , whether by perils of the sea, or by fire, or by other causes therein mentioned, not exceeding \$.]

4. That the said vessel, while proceeding on the voyage mentioned in said policy, was, on the day of , 19 , totally lost and destroyed by the perils of the sea.

5. That the plaintiff's loss thereby was \$.

6. That on the day of , 19 , the plaintiff furnished the defendant with proof of his loss and interest, and otherwise duly performed all the conditions of the said policy on his part.

7. That the defendant has not paid the said loss, and the same is still wholly due and unpaid from defendant to plaintiff.

[Concluding part.]

FORM No. 719—For partial loss and contribution.—Marine policy.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1-3. [As in preceding form.]

4. That on the day of , 19 , said vessel sailed from on the said voyage, and while proceeding thereon was, by the perils of the sea, stranded and damaged in her hull, machinery, and appurtenances, whereby it became necessary for the preservation of the vessel and her cargo to throw overboard a part of said cargo, and the same was accordingly thrown over for that purpose.

5. That by reason thereof, the plaintiff was compelled to expend \$ in repairing said vessel at , and also to pay \$ as contribution for the loss caused by said throwing overboard of part of the cargo.

6. That on the day of , 19 , at , the plaintiff gave to the defendants due notice and proof of the loss as aforesaid, and otherwise duly performed all the conditions of said policy of insurance on his part.

7. [Same as paragraph 7, preceding form.]

[Concluding part.]

FORM No. 720—Allegation of renewal.

[Title of court and cause.]

That on the day of , 19 , at , the defendants, by their agents duly authorized thereto, in consideration of \$ to

them paid by the plaintiff, executed and delivered to this plaintiff their certificate of renewal of said policy, a copy of which is hereto annexed as a part of this complaint [or petition].

FORM No. 721—Averment where plaintiff purchased the property after insurance.

[Title of court and cause.]

That on the day of , 19 , at , with the consent of the defendants, in writing, on said policy, by their agents, the said [original insured] sold, assigned, and conveyed to the plaintiff his interest in the said [property] and in the said policy of insurance.

FORM No. 722—Averment of waiver of condition.

[Title of court and cause.]

On the day of , 19 , the defendants waived the condition of the policy requiring [set out the condition], and released the plaintiff from the performance thereof by [state how condition was released].

§ 342. ANSWERS.

FORM No. 723—Denial of policy.

[Title of court and cause.]

The defendant answering to the plaintiff's complaint [or petition] :

Denies that he ever made or delivered the policy of insurance therein alleged, or any policy of insurance whatsoever, upon the property described [or upon any property belonging to plaintiff].

[Etc.]

FORM No. 724—Denial of plaintiff's interest.

[Title of court and cause.]

[After introductory part:]

Defendant denies that the plaintiff owned or had any insurable interest whatever in the goods or chattels [or premises] in the complaint [or petition] described at the time of the happening of the loss in said complaint [or petition] alleged.

FORM No. 725—Defense based upon denial of loss.

[Title of court and cause.]

[After introductory part:]

Defendant avers that the loss therein described was not caused

during the term of said insurance by any of the perils insured against, but said loss was occasioned and caused wholly by [indicate the excepted peril].

FORM No. 726—Defense of misrepresentation and concealment.

[Title of court and cause.]

[Introductory part:]

That the defendants were induced to make and deliver the policy of insurance therein described by the fraudulent concealment and misrepresentations of the plaintiff made to the defendants of the following facts known to the plaintiff, the same being material to the risk and not known to the defendants, and which if known would have increased the premium, to wit: [Set out particular facts concealed or misrepresented.]

FORM No. 727—Defense setting forth "fallen building" clause in action upon fire insurance policy.

[Title of court and cause.]

Now comes the defendant, and for answer to plaintiff's complaint:

Denies that no part of said building fell except as the result of said fire; but, on the contrary, alleges that before the loss or damage by fire, or any part thereof, in said complaint referred to occurred said building fell in whole or in part, otherwise than as the result of fire, by reason whereof all insurance by the said policy on said building did immediately cease, and the said policy was not in force or effect at the time the said property was damaged or destroyed by fire [etc.].

Wherefore, defendant prays to be hence dismissed with its costs.

C. D., Attorney for defendant.

[Verification.]

[The defense set out in substance in form No. 727 was interposed to the complaint in form No. 709. The facts, however, did not sustain the averment of the defense, and judgment was therefore rendered the plaintiff and affirmed on appeal: *Clayburgh v. Agricultural Ins. Co.*, 155 Cal. 708, 102 Pac. 812.]

FORM No. 728—Defense of overinsurance without consent of insurer.

[Title of court and cause.]

[Introductory part:]

1. That by the terms of the said insurance policy the same shall become void in case the assured shall have, or shall thereafter procure, other insurance, unless consent therefor was given by these defendants and endorsed on said policy.

2. That before [after; or, at the time of] granting the policy sued on, the plaintiff became insured on the same property in another company, to which the defendants never consented, nor was any consent endorsed on the policy.

FORM No. 729—Defenses—(1) denial of furnishing proofs of death, (2) denial of indebtedness, (3) denial of waiver of conditions.—In general defense of forfeiture of policy for non-payment of premium.

(Blake v. National Life Insurance Co., 123 Cal. 470; 56 Pac. 101.)

[Title of court and cause.]

Now comes the defendant in the above-entitled action, and answering the first cause of action set forth in plaintiff's complaint:

[Denial of furnishing proofs of death.]

Denies that on the 14th day of March, 1894, or at any other time, plaintiff furnished defendant with satisfactory proofs or any proofs of the death of said deceased, as required by the terms of said policy, and denies that said deceased in his lifetime, or that plaintiff as executrix, duly or at all performed all or any of the conditions and requirements, or conditions or requirements, of said contract of insurance on his or her part.

[Denial of indebtedness under the policy.]

Denies that there is now due and owing, or due or owing, from said defendant to said plaintiff, as such executrix or otherwise, upon or on account of said policy of insurance, the sum of \$10,000, with interest thereon at the rate of seven per cent per annum from the 14th day of March, 1894, or that there ever was or is due or owing from defendant to plaintiff any sum of money whatever.

2. And answering the second cause of action set forth in plaintiff's complaint, defendant [here follows denial of furnishing proofs of death, and of performance of conditions, etc., as in first paragraph].

[Denial of averments as to waiver of conditions, etc.]

Defendant admits that said deceased in his lifetime and said executrix did not perform the conditions in said policy of insurance, which provided that failure to pay any premium or any part thereof or any note given therefor when due should cancel the insurance and said contract, but denies that during the lifetime of said Charles E. Blake, or at any time, defendant for a valuable or any consideration, or at all, waived the said condition or any portion thereof.

And in this behalf defendant avers, that it at no time made any agreement whatever with said Charles E. Blake, or with any other person, waiving the condition of payment of the premium payable on the 26th day of December, 1893, or extending the time of payment

of said premium, or any premiums, or giving him credit therefor, or that it at any time waived any of the conditions of said policy; on the contrary, defendant avers that it refused to extend the time of payment of said premium due on the 26th day of December, 1893, or to give said Charles E. Blake credit therefor.

Wherefore, defendant prays to be hence dismissed with its costs.
Dated this 15th day of November, 1894.

[Verification.]

Metcalf & Metcalf,
Attorneys for defendant.

FORM No. 730—Transfer without insurer's consent.

[Title of court and cause.]

[Commencement.]

1. That the said insurance policy therein described provides, among other things, that in case of any transfer of the interest of the insured by sale or otherwise, without the consent of the insurer, the policy should from thenceforth be void.

2. That on the day of , 19 , and before the loss alleged, the interest of the insured in said property was transferred to , without the consent of the defendants, whereby the said policy became void.

FORM No. 731—Defense that a fraudulent account of loss was given.

[Title of court and cause.]

[After the introductory part:]

That after the alleged loss and damage, and before the commencement of this action, the plaintiff made and delivered to the defendants a false and fraudulent account of the alleged loss and damage in this: [Here specify the particular acts of fraud.]

[Concluding part.]

FORM No. 732—Defense that risk was extra-hazardous.

[Title of court and cause.]

[After introductory part:]

1. [Allege provisions of policy exempting from liability for extra-hazardous risks.]

2. That after the making of said policy, and before the loss alleged, the plaintiff received into said store a large quantity of goods known and described as extra-hazardous, to wit, [here spec-

ify]; and at the time of the said fire, the plaintiff had in said store a large quantity of such extra-hazardous goods.

[Concluding part.]

FORM No. 733—Denial of loss from peril or risk insured against.

[Title of court and cause.]

Defendant denies that the said building was destroyed [or injured] during the term of said insurance by [here state risks or perils insured against], but, on the contrary, the defendant alleges that the loss was occasioned and caused wholly by [here state the excepted peril which caused the loss].

[Concluding part.]

FORM No. 734—Defense that vessel was unseaworthy.

[Title of court and cause.]

1. [Allege provisions of policy, as to voiding the policy for unseaworthiness.]

2. That at , and in the course of said voyage, and in reference to the said voyage, and to any damage which the said ship sustained in the course thereof, a regular survey was made on the day of , 19 , and that upon such survey the said ship was declared unseaworthy, by reason of her being [state particulars, showing a ground of her condemnation as unseaworthy].

[Concluding part.]

Form of answer in an action on an insurance policy, setting forth the defense based on a provision that in case of loss the insured should within sixty days render to the company an account of the loss, signed and sworn to: *Western Home Ins. Co. v. Thorp*, 48 Kan. 239, 240, 28 Pac. 991.

Form of petition in an action to recover a sum alleged to be due on a matured endowment coupon issued by defendant to plaintiff: *Hogan v. Pacific Endowment League*, 99 Cal. 248, 250, 33 Pac. 924.

Form of petition in an action on a life insurance policy, containing a provision, relied upon by the defendant as not observed by decedent, that if the insured should become so intemperate as to impair his health or induce delirium tremens, the policy should become void: *Pomeroy v. Rocky Mountain Ins. etc. Inst.*, 9 Colo. 295, 12 Pac. 153, 59 Am. Rep. 144.

Form of petition in an action on an insurance policy, which did not properly describe the real estate on which the dwelling-house that was burned was situated: *Kansas Farmers' Fire Ins. Co. v. Saindon*, 52 Kan. 486, 488, 35 Pac. 15, 16, 39 Am. St. Rep. 356.

Form of complaint in an action on a fire insurance policy on growing crops: *Denver Fire Ins. Co. v. McClelland*, 9 Colo. 12, 9 Pac. 771, 59 Am. Rep. 184.

For defenses in an action at law upon a policy of fire insurance held sufficient as against general demurrer, see *Slafter v. Concordia Fire Ins. Co.*, 142 Iowa 116, 120 N. W. 706, 708.

For an agreed statement of the facts in an action to recover upon an insurance policy, see *Dodge v. Hamburg-Bremen Fire Ins. Co.*, 4 Kan. App. 415, 418, 46 Pac. 25, 26.

§ 343. ANNOTATIONS.—Insurance.

1. Life insurance.—Essentials of a complaint in action to recover insurance moneys.
2. Insurable interest not required to be averred.
3. Defenses in action to recover insurance money.
4. Property insurance.—General rule as to pleading loss.
5. Averments as to ownership.
6. General averment as to performance of conditions.
- 7, 8. Defenses.—Any breach pleadable.
- 9, 10. Defense of fraudulent overvaluation.

1. LIFE INSURANCE.—Essentials of a complaint in action to recover insurance moneys.—A complaint in an action to recover insurance moneys, under the rule as established in the state of Colorado, is only required to allege primarily, first, the contract of insurance; secondly, the happening of the contingency whereby the insurer became liable to pay by reason of the contract; and thirdly, the amount of the indemnity to which the insurer or his successors, in the event of his death, is entitled: *Grand Lodge A. O. U. W. v. Taylor*, 44 Colo. 373, 99 Pac. 570, 571; *Penn Mutual L. Ins. Co. v. Ornauer*, 39 Colo. 498, 90 Pac. 846; *National Ins. Co. v. Sprague*, 40 Colo. 344, 92 Pac. 227.

2. Insurable interest not required to be averred.—In an action to recover insurance upon the death of the insured, it is not necessary for the plaintiff to aver any interest in the life of the insured. If the insurer relies on the defense that the plaintiff had no insurable interest in the life of the insured, it devolves upon it to plead and prove it. Where the question is not put in issue by the pleadings, the court rightfully refuses to submit it to the jury: *Foresters of America v. Hollis*, 70 Kan. 71, 78 Pac. 160, 8 Am. & Eng. Ann. Cas. 535.

3. Defenses in action to recover insurance money.—In an action to recover insurance money instituted by the representative of the deceased, the following is given as a statement of affirmative defenses, which, although not sustained by the evidence in the case, is a fairly clear and concise example of pleading affirmative defenses in such actions, to wit: (1) That in his application for insurance the deceased falsely and fraudulently represented that he was in good health and free from disease;

that he had had no sickness during the past five years; that he had no disease of the kidneys or urinary organs; that he had not consulted a physician for four years prior to the date of his application; that in truth and in fact, at the time of making such application, the deceased well knew that he was not in good health nor free from disease; that he had consulted a physician about three months prior to the date of his application, and was by him informed that he was afflicted with a disease of the kidneys and urinary organs; that said representations were falsely and fraudulently made by the deceased for the purpose of obtaining said policies; and that the defendant relied on said false and fraudulent representations. (2) That in his application for insurance the deceased warranted the statements and answers therein made to be full, complete, and true, and that any untrue answers made therein or any concealment of the truth as to his health, physical condition, or personal or family history should forfeit and cancel the policies issued pursuant to such application; that the application contained the warranties and representations set forth in the first affirmative defense; that the defendant relied on such warranties and representations, and issued the policies in consideration thereof; and that the warranties and representations were untrue. (3) That the application provides that the policies should not take effect unless the first payment was made and the policies signed by the secretary and delivered during the continuance of the applicant in good health, and that at the time the first payment was made and the certificate signed and delivered the applicant was not in good health: Fer-

randini v. Bankers Life Assn., 51 Wash. 442, 99 Pac. 6, 7.

4. PROPERTY INSURANCE.—General rule as to pleading loss.—A complaint in an action to recover upon a policy insuring against loss must allege facts bringing the destruction of the property within the protection of the policy; for example, where a policy insured plaintiff against loss arising from the death of his horses occurring from "disease or accident," a pleading is insufficient on demurrer where there is no averment that either disease or accident was the cause of the death: *Knutzen v. National L. S. I. Co.*, 108 Minn. 163, 121 N. W. 632; *Griggs v. St. Paul*, 9 Minn. 246 (Gil. 231); *Newman v. Accident Assn.*, 15 Ind. App. 29, 42 N. E. 650; *Weltin v. Ins. Co.*, 59 Hun 625, 13 N. Y. Supp. 700.

5. Averments as to ownership.—In an action to recover upon an insurance policy, an objection to the petition that it omitted to allege specifically that plaintiff owned the property insured at the time of the loss can not first be taken after judgment. Moreover, such an objection is without force where sufficient facts are alleged from which the ownership of the property at the time of the loss may be implied: *Cox v. American Ins. Co.*, 137 Mo. App. 40, 119 S. W. 476, 478; *Rodgers v. Insurance Co.*, 186 Mo. 248, 85 S. W. 369.

6. General averment of performance of conditions.—It is well settled under the Missouri authorities, that, under a general averment of performance of all conditions on his part to be performed, the plaintiff in an action on an insurance policy may prove any and all forms of waiver. It is said the proof of waiver is included in performance within the meaning of the allegation; but that the rule does not apply to other than insurance cases: *Andrus v. Insurance Co.*, 168 Mo. 151, 67 S. W. 582; *McCullough v. Insurance Co.*, 113 Mo. 607, 21 S. W. 207; *Murphy v. Insurance Co.*, 70 Mo. App. 78; *Winn v. Insurance Co.*, 83 Mo. App. 123; *Wicecarver v. Mercantile etc. I. Co.*, 137 Mo. App. 247, 117 S. W. 698.

7. Defenses.—Defense to action upon fire insurance policy based upon violation of vacancy-permitting clause contained in the policy, considered: *National M. F. I. Co. v. Duncan*, 44 Colo. 472, 98 Pac. 634, 638, 20 L. R. A. (N. S.) 340.

8. Any breach by the insured of a condition in the policy may be pleaded in defense in an action to recover thereon. It is a good defense to an action upon a policy of insurance to set out a breach of a condition under the contract imposing a duty upon the plaintiff to protect the property so far as practicable in case of fire, as where the defense alleges in this respect that the plaintiff permitted persons to enter the building after the fire, to handle and carry away some of the property covered by the policy, and to trespass upon the property: *Slafter v. Concordia Fire Ins. Co.*, 142 Iowa 116, 120 N. W. 706, 708; *Thornton v. Security Co. (C. C.)*, 117 Fed. 773; *Oshkosh v. Manchester Co.*, 92 Wis. 510, 66 N. W. 525.

9. The defense of fraudulent overvaluation of property deemed sufficient: *Slafter v. Concordia F. I. Co.*, 142 Iowa 116, 120 N. W. 706, 709; *Behrens v. Insurance Co.*, 64 Iowa, 19, 19 N. W. 838; *Bennett v. Insurance Co.*, 51 Conn. 504; *American Ins. Co. v. Gilbert*, 27 Mich. 429; *Dunham v. Insurance Co.*, 34 Wash. 205, 75 Pac. 804; *Hartford Co. v. Magee*, 47 Ill. App. 367; *Lycoming Co. v. Rubin*, 79 Ill. 402; *Baker v. Insurance Co.*, 31 Ore. 41, 48 Pac. 699, 65 Am. St. Rep. 807; *Phenix Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393; *Titus v. Insurance Co.*, 81 N. Y. 410.

10. Defense of overvaluation held good as against general demurrer, and that it was error to sustain such demurrer thereto. Defense is as follows: "(5) For a further and 5th defense, this defendant says: That the policy of insurance so issued to the plaintiff by the defendant, as in the plaintiff's complaint set forth, contained the following provision: 'This policy is made and issued subject to the foregoing stipulations, conditions and by-laws of the National Mutual Fire Insurance Company.' That article thirty-two of the by-laws of the defendant company is as follows: 'The application, by-laws and policy constitute the entire contract between this company and the insured, and no officer, agent, or representative of the company is authorized, empowered, or permitted to make any other verbal or written agreement in reference to any matter pertaining thereto.' That article fifteen of the by-laws of the defendant corporation is as follows: 'All applications for insurance must be

in writing, according to the printed forms prepared by the company. The description of the property and its location must be minute and particular, and the applicant must be responsible for the correctness of the application; and any misrepresentation in reference to said property shall void such policy, and no agreement or representation other than expressed in said application shall be binding upon the company.' That an application to the defendant by the plaintiff was made in writing for the issuance of the policy mentioned in complaint, which said application was duly signed by the plaintiff; that said application contained the following provisions: 'The above statements, notes, and by-laws, as printed, shall be the sole basis of this contract for insurance between said company and the insured, and are hereby made a part of this policy, if issued. Having read or heard read the foregoing application, and fully understanding its contents, I warrant it

to contain a full and true description and statement of the condition, situation as per diagram, value, occupation, and title of the property to be insured in the said company, and I warrant the answers to each of the foregoing to be true.' That said policy of insurance contained the following provision, to wit: 'This entire policy shall be void if the insurer has concealed, or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof.' And the defendant further says that in the plaintiff's application for said policy of insurance the plaintiff falsely stated and represented that the cash value of the insured building was \$1,500; whereas, in truth and in fact, the cash value of said building at the time of said application, and at all times thereafter, did not exceed the sum of \$200": National M. F. L. Co. v. Duncan, 44 Colo. 472, 98 Pac. 634, 20 L. R. A. (N. S.) 340.

CHAPTER XCVII.

Negotiable Instruments.

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§ 344. COMPLAINTS [OR PETITIONS].

FORM No. 735—By first endorsee against maker.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant made his promissory note in writing, dated on that day, and thereby promised to pay to the order of one C. D. \$, months after said date.

2. That the said C. D. thereafter endorsed the said note to the plaintiff, and that the plaintiff is now the owner and holder thereof.

3. That the said sum has not been paid, nor any part thereof [except the sum of, etc.], and that the whole thereof [or state, if a portion] remains due and payable from the defendant to the plaintiff.

[Concluding part.]

FORM No. 736—By subsequent endorsee against maker.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Allegation of execution of note.]

2. That the same was thereafter endorsed by the said C. D. and one E. F. and one G. H., and thereby transferred to the plaintiff, who became, and now is, the owner thereof for value.

3. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 737—By first endorsee against first endorser.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Allegation of execution of note.]

2. That then and there [or thereafter] the defendant endorsed said note to the plaintiff, who is now the owner and holder thereof.

3. That on the day of , 19 , said note was duly presented for payment, and payment thereof demanded, but the same was not paid; that due notice of the said non-payment thereof was given to the defendant.

4. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 738—By subsequent endorsee against immediate endorser.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made his promissory note in writing, dated on that day, and thereby promised to pay to the order of E. F., \$, days after said date.

2. That the said E. F. thereafter endorsed the said note to the defendant, and the defendant endorsed the same to the plaintiff for value, and plaintiff is now the owner and holder thereof.

3, 4. [Same as paragraphs 3 and 4, form No. 737.]

[Concluding part.]

FORM No. 739—By subsequent endorsee against first endorser.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made his promissory note in writing, dated on that day, and thereby prom-

ised to pay to the defendant, or order, \$, months after said date.

2. That then and there [or thereafter] the defendant endorsed said note to one E. F., who thereafter by endorsement transferred the same to the plaintiff for value.

3. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 740—By subsequent endorsee against all prior parties.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , at , the defendant Y. Z. made his promissory note in writing, dated on that day, and thereby promised to pay to the order of the defendant W. X. \$, months after said date.

2. That the said W. X. endorsed the said note to the defendant U. V., who endorsed the same to the plaintiff for value, and that the plaintiff is now the owner and holder thereof.

3. That on the day of , 19 , the same was duly presented to the said Y. Z. for payment, but it was not paid, due notice of which was given to W. X. and U. V. [Or, aver excuse for non-presentment.]

4. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 741—On note wrongly dated.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant made and delivered to the plaintiff his promissory note in writing, of which the following is a copy: [Copy of note.] That by mistake said note was made to bear date on the day of , 19 , instead of the said day of , 19 , which latter date was in truth intended.

2. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 742—On sight note.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Allegation of execution of note.]

2. That on the day of , 19 , at , the said note was duly presented to the defendant [maker], with notice that payment was required according to its terms.

3. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 743—By domestic corporation, payee, against foreign corporation.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Allegation of incorporation of plaintiff.]

2. That the defendant is a corporation, duly chartered by and under the laws of the state of , pursuant to an act of the legislature of said state entitled [give title of act], passed [give date of enactment].

3. That on the day of , 19 , at , the defendant, as such corporation, by its agent duly authorized thereunto, made its promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiff, under its corporate name of , \$, months after said date. A copy of said note is hereto annexed, marked "Exhibit A," and made a part of this complaint [or petition].

4. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 744—By payee as receiver against partners.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That heretofore the defendants, under their firm name of Y. Z. & Co., made their promissory note in writing, dated the day of , 19 , and thereby promised to pay to the plaintiff, as such receiver [or his order], \$, months after said date.

2. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 745—By partners on note payable to firm.

[Title of court and cause.]

The plaintiffs complain of the defendant, and allege:

1. [Allegation of copartnership.]

2. That on the day of , 19 , at , the defendant made and delivered to the plaintiffs his promissory note in writing, and thereby promised to pay them under their firm name of A. B. & Co. [or their order], \$, months after said date [or on the day of , 19].

3. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 746—By payee against surviving partner.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That at the time of the making of the note hereinafter mentioned, the defendant and one W. X. were partners, carrying on business under the firm name of Y. Z. & Co.

2. That on the day of , 19 , at , they made, under said firm name, their promissory note in writing of that date, a copy of which is as follows: [Insert copy.]

3. That on the day of , 19 , at , the said W. X. died, leaving the defendant the sole surviving partner of said firm.

4. [Same as paragraph 3, form No. 735.]

Wherefore, the plaintiff prays judgment [etc.].

FORM No. 747—Averments as to partnership promissory note endorsed to plaintiffs.

(In *Hallock v. Jaudin*, 34 Cal. 167, 168.)¹

[Title of court and cause.]

The plaintiffs complain of the defendants, and allege:

1. That on the 15th day of August, 1866, the defendants [E. Jaudin and G. Kennedy were, and during all the times herein mentioned have been, copartners doing business under the firm name of E. Jaudin & Co.]; that on said date defendants, as such copartners,

¹ While the complaint (omitting the bracketed portions) in *Hallock v. Jaudin*, supra, was held sufficient as against a demurrer, the court says that the same would have been more artistic and logical if it had alleged in the body of the complaint that the defendants were copartners in business at the time the note was made, and that the firm made it, and further that the complaint avers a promise to pay. (Under the existing California statute, a promise to pay is implied by the written instrument itself, as the same imports a consideration. See section 1614 of Kerr's Cyclopedic Civil Code of California and notes, and see *Henke v. Eureka Endowment Assn.*, 100 Cal. 429, 432, 34 Pac. 1089. The portion of the complaint appearing in brackets corrects the remaining defects pointed out in the decision.)

made their promissory note in writing, in the words and figures following, to wit: [Here follows copy.]

2. That the defendants [thereupon] delivered the said note to the payee thereof, who afterwards, on the same day, [assigned and] endorsed in writing, and delivered the same to the plaintiffs, who ever since have been, and still are, the holders, and entitled to the payment thereof.

3. That the said note is due and payable, and payment thereof was demanded on the day the same became due, and often thereafter, but to pay the same or any part thereof the defendants have hitherto refused, and still do refuse.

[Concluding part.]

FORM No. 748—By partners on protested promissory note.

(In *Hartzell v. McClurg*, 54 Neb. 316; 74 N. W. 626.)

[Title of court and cause.]

The plaintiffs complain of the defendant, and allege:

1. That plaintiffs are partners, and doing business under the firm name of ; that on , 19 , and for a valuable consideration, , defendant, executed and delivered to plaintiffs his promissory note in writing, wherein and whereby he, defendant, promised to pay to plaintiffs' order the sum of \$, on , 19 , with interest thereon from date until paid.

2. That afterwards, to wit, on the day of , 19 , the plaintiffs, for a valuable consideration, sold and discounted said note; that at the maturity thereof the owners, in the usual course of business, caused said note to be presented at the National Bank, the place of presentation thereof for payment, and payment thereof was then and there by defendant refused; that said note was, by reason of the neglect and refusal of the defendant to pay the same, thereafter duly protested, at the cost of \$ for protest fees; that said note is wholly due and payable, and defendant wholly neglects to pay the same, or any part thereof.

Wherefore, plaintiffs pray judgment against defendant [etc.; including in the demand, besides the principal sum, protest fees and costs].

[Signatures, etc.]

Jury's Pl.—\$7.

FORM No. 749—On note signed by agent.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant, by his agent [or his attorney in fact], duly authorized, made his promissory note, and thereby promised to pay to the plaintiff [or his order] \$, months after said date.

2. [Same as paragraph 3, form No. 735.]

Wherefore, the plaintiff prays judgment [etc.].

FORM No. 750—Action upon a promissory note executed by an agent of a partnership.

(In *Redemeyer v. Henley*, 107 Cal. 175; 40 Pac. 230.) ¹

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1. That the defendants, Whitcombe Henley, Barclay Henley, and Thomas B. Henley, are now, and at all times herein named have been, partners doing business in the county of Mendocino, state of California, under the firm name and style of W. Henley & Bros.

2. That on the 15th day of April, 1893, the defendants, by their agent, W. Henley, thereunto duly authorized, made and executed their certain promissory note in writing, of which the following is a copy, to wit: [Here follows copy], and then and there delivered the same to plaintiff, who is now the lawful owner and holder thereof.

3. That the said promissory note has not been paid, nor any part thereof, nor any part of the interest thereon, but the whole amount thereof, to wit, the sum of \$1,601.60, with interest thereon from the 15th day of April, 1893, at the rate of ten per cent per annum, still remains due and owing to this plaintiff from defendants.

[Concluding part.]

¹ The substance of an objection made to this complaint (corrected in this form) was that it did not show authority to make the note, because such authority was not expressly alleged nor implied in any of the express allegations. The court, however, held that such authority is sufficiently implied in the express allegation that "defendants, Whitcombe Henley, Barclay Henley, and Thomas B. Henley, partners doing business under the firm name of W. Henley & Bros., by their agent, W. Henley, made and executed" the note. The truth of this allegation is admitted by a default: *Redemeyer v. Henley*, 107 Cal. 175, 177, 40 Pac. 230.

FORM No. 751—Upon a joint and several promissory note.

(In *Rhodes v. Hutchins*, 10 Colo. 258; 15 Pac. 329.)

[Title of court and cause.]

[After introductory part:]

1. That the defendants are indebted to the plaintiffs on a certain promissory note payable to the plaintiff or order, of which the following is a copy: [Copy of note inserted]; that there are no credits or endorsements thereon.

2. That there is due and owing the plaintiff from defendants on said note the sum of \$1,050, and interest thereon from December 3, 1881.

3. That defendants have not, nor has either of them, ever paid the sum of money above mentioned, or any part thereof.

[Concluding part.]

FORM No. 752—On note executed in another state.

(In *Minneapolis Harvester Works v. Smith*, 36 Neb. 616; 54 N. W. 973.)

[Title of court and cause, etc.]

Now comes the plaintiff in the above-entitled cause and complains of the defendant, and alleges:

1. That plaintiff was on the day of , 19 , and still is, a corporation duly organized under the laws of Minnesota.

2. That the defendant on the day of , 19 , made his certain promissory note at , Minnesota, and delivered the same to the plaintiff. Said note is hereto attached, marked "Exhibit A," and made a part of this petition.

3. That by the laws of , the statute provides that an action of debt on a promissory note may be commenced within ten years from the time the cause of action accrues.

4. That the defendant had resided in the state of since the giving of said note, and prior to the commencement of this action, for the space of three years.

5. That said note has not been paid, nor any part thereof, and there is now due and payable thereon the sum of \$, with interest at the rate of per cent per annum from the day of , 19 .

[Concluding part.]

[Copy of note attached as exhibit.]

FORM No. 753—By payee of bill against acceptor for non-payment.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant made and executed to the plaintiff his certain bill of exchange, in writing, of that date, a copy of which is here set forth: [Copy of bill.]

2. That thereafter, to wit, on the day of , 19 , the defendant accepted said bill.

3. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 754—By payee of bill against drawer after non-acceptance.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Allegation of execution of bill, as in form No. 753.]

2. That said bill was duly presented to the said [drawee] for acceptance, but was not accepted, and that due notice thereof was given to the defendant.

3. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 755—For non-payment of bill payable on specific date.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That, on the day of , 19 , at , the defendant made and delivered to the plaintiff his bill of exchange in writing of that date, directed to one C. D., and thereby required the said C. D. to pay to the order of the plaintiff \$, on the day of , 19 , for value received.

2. That said bill was duly presented to the said C. D. for payment, but was not accepted or paid, and that due notice thereof was given to the defendant.

3. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 756—By assignee of bill payable out of particular fund.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made, executed, and delivered to one E. F., his bill of exchange or order, in writing, of that date, and directed the same to the defendant, and thereby required the defendant to pay to said E. F., out of the proceeds of [state fund as in the bill], \$, days after the date thereof, for value received.

2. That on the day of , 19 , at , upon sight thereof, the defendant accepted the same, payable when in funds, from the proceeds of [etc., as in acceptance].

3. That on the day of , 19 , at , said E. F. duly assigned said bill to the plaintiff, and that the plaintiff is now the owner and holder thereof.

4. That on the day of , 19 , at , the defendant had funds of the said C. D., proceeds of [etc., as stipulated in acceptance].

5. That on the day of , 19 , at , the plaintiff duly demanded payment thereof from the defendant.

6. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 757—By payee against drawee and acceptor.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , at , the defendant Y. Z. made and delivered to the plaintiff his bill of exchange in writing of that date, and directed it to the defendant W. X. [acceptor], and thereby required the said W. X. to pay to the plaintiff \$, days after the date thereof [or otherwise, as the case may be], for value received.

2. That on the day of , 19 , the defendant W. X., upon sight thereof, accepted the said bill. [Copy of bill and acceptance.]

3. That the same was duly presented to the defendant W. X. for payment at maturity, but was not paid, notice of which was duly given to the defendant Y. Z.

4. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 758—By payee, on bill accepted for honor.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant C. D. [drawer] made and delivered to the plaintiff his bill of exchange in writing, of that date, directed to one E. F., and thereby required the said E. F. to pay to the plaintiff \$, days after the date thereof [or otherwise, as the case may be]. [Insert copy of bill and acceptances.]

2. That on the day of , 19 , it was duly presented to the said E. F. for acceptance, but was not accepted, and notice thereof was given to the defendant C. D.

3. That on the day of , 19 , at , the defendant G. H. [acceptor for honor], upon sight thereof, accepted said bill for the honor of said C. D.

4. That the same was duly presented for payment, at maturity, to the said E. F., but was not paid, notice of which was given to the defendant C. D.

5. That thereupon the same was duly presented to the defendant G. H. [acceptor for honor], for payment, but was not paid, notice of which was given to the defendant C. D.

6. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 759—By first endorsee of bill against acceptor.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made his bill of exchange in writing of that date, and thereby required the defendant to pay to the order of one E. F., \$, days after sight thereof, a copy of which is here set forth: [Insert copy.]

2. That on the day of , 19 , the defendant accepted said bill, and thereafter the said E. F. endorsed the same to the plaintiff.

3. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 760—By endorsee of bill against first endorser.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made his bill of exchange in writing of that date, and thereby required one E. F. to pay to the order of the defendant \$, after sight thereof.

2. That the defendant endorsed the said bill to the plaintiff, and the same was accepted by the said E. F. on the day of , 19 , at . [Insert copy of bill, endorsement, and acceptance.]

3. That on the day of , 19 , at , the same was duly presented to for payment, but was not paid, of all which due notice was given to the defendant.

4. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 761—By remote endorsee against drawer and endorser for non-acceptance.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , at , the defendant [drawer], by his bill of exchange, in writing, of that date, required one C. D. to pay to the order of one E. F. \$, days after the date thereof [or as the case may be].

2. That the said G. H. [drawer] then and there delivered the same to the said E. F., who then and there endorsed it to the defendant L. M.

3. That on the day of , 19 , at , the defendant L. M. endorsed the same to the plaintiff for value. The following is a copy of said bill and the endorsements thereon: [Copy.]

4. That the said bill was duly presented to C. D. [drawee] for acceptance, but was not accepted, due notice of which was given to the defendants.

5. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 762—By subsequent endorsee of bill against first endorser.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made his bill of exchange in writing, of that date, requiring one G. H. to pay to the order of the defendant \$, days after sight thereof [or as the case may be].

2. That the defendant endorsed said bill to one E. F., and the same was accepted by G. H. on the day of , 19 , at .

3. That the same was by the endorsement of E. F. transferred to the plaintiff, and on the day of , 19 , at , was presented to the said G. H. for payment, but was not paid, due notice of which was given to the defendant.

4. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 763—By subsequent endorsee of bill against intermediate endorser.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made his bill of exchange, in writing, of that date, and thereby required one E. F. to pay to the order of G. H. \$, days after sight thereof [or as the case may be].

2. The said bill was endorsed by the said G. H. to the defendant, and by the endorsement of the defendant [and others], the same was transferred to the plaintiff.

3. [Allegation of presentment, non-payment, and notice, as in preceding form.]

4. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 764—By subsequent endorsee of bill against last endorser.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. made his bill of exchange, in writing, of that date, and thereby required one E. F. to pay to the order of G. H. \$, days after sight thereof [or as the case may be].

2. That the said bill was endorsed by said G. H. to the defendant, and the same was endorsed by the defendant to this plaintiff.

3. That on the day of , 19 , at , the same was duly presented to the said E. F. for payment, but was not paid, due notice of which was given to the defendant.

4. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 765—By first endorsee of bill against all prior parties.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , at , the defendant C. D. made his bill of exchange, in writing, of that date, and thereby requested E. F. to pay to the order of the defendant G. H. \$, days after the date thereof.

2. That the said C. D. then and there [or thereafter] delivered the same to the said G. H., who thereupon endorsed it to the defendant L. M., who endorsed it to the plaintiff for value on the day of , 19 .

3. That on the day of , 19 , at , the defendant E. F. accepted said bill upon sight.

4. That the same was duly presented to the defendant E. F. for payment at maturity, but was not paid, of which due notice was given to the defendants C. D., G. H., and L. M.

5. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 766—By subsequent endorsee against all prior parties.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant C. D. made his bill of exchange, in writing, of that date, and thereby required the defendant E. F. to pay to the order of the defendant G. H. \$, days after sight thereof.

2. That on the day of , 19 , the same was accepted by the said E. F., and endorsed by the said G. H. to the plaintiff.

3. That on the day of , 19 , the same was duly presented to the said E. F. for payment, but was not paid, of which due notice was given to the other defendants, and to each of them.

4. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 767—Action against a bank upon acceptance, followed by refusal to pay check.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. [Aver incorporation of defendant.]

2. That on the day of , 19 , one made his check, in writing, bearing date on that day, and directed it to the defendant, and delivered the same to this plaintiff for value, which check was in the words and figures following, to wit: [Insert copy.]

3. That thereafter, and on the day of , 19 , the defendant, in writing, accepted said check and promised to pay the same.

4. That thereafter, on the day of , 19 , plaintiff presented said check to the defendant at its said place of business for payment; that said bank then refused, and ever since has refused, to pay the same, or any part thereof, and the same is wholly due, payable, and unpaid from defendant to plaintiff.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$, the amount of said check, and interest thereon from the day of , 19 , and for plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 768—Action upon an accepted and assigned draft.

(In *Fisher v. Frank*, 8 Cal. App. 472; 97 Pac. 95.)

[Title of court and cause.]

Now comes the plaintiff above named and complains of defendant, and for cause of action alleges:

1. That heretofore, to wit, on the 16th day of September, 1904, defendant, George Frank, doing business as George Frank & Co., for value, accepted at San Jose, Santa Clara County, state of California, a draft in favor of W. C. Kennedy for \$2,538.12, which said draft and the acceptance thereof and endorsements thereon are as follows, to wit: [Here follows copy of draft with endorsements of partial payments, acceptances, etc.]

2. That said draft was, for value, after acceptance thereof by defendant, duly assigned to Fiacro Fisher, the plaintiff herein, who ever since has been, and now is, the owner and holder thereof.

3. That there has been paid by defendant upon said draft after acceptance the sum of \$1,100; that no other or further sum has been paid thereon; that thereafter, and before the commencement of this suit, plaintiff duly demanded of defendant the balance due, to wit, the sum of \$1,438.12, but to pay the same or any part thereof the defendant then and there and ever since has refused; that there is now due, owing, payable, and unpaid from defendant to plaintiff the sum of \$1,438.12, in United States gold coin, together with interest thereon at seven per cent per annum from the 16th day of September, 1904, to wit, \$113.32,—in all, \$1,551.44, in United States gold coin.

Wherefore, plaintiff prays judgment against defendant for said sum of \$1,551.44, in United States gold coin, together with his costs herein expended.

[Verification.]

W. C. Kennedy,
Attorney for plaintiff.

FORM No. 769—By payee of check against drawer.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant made and delivered to the plaintiff his check, in writing, of that date, and directed the same to the bank of C. D., requiring said bank to pay to the plaintiff or order [or bearer] \$, said check being in the words and figures as follows: [Copy.]

2. That said check was duly presented on the day of , 19 , to the said [drawee] for payment, but was not paid, due notice of which was given to the defendant [drawer].

3. [Same as paragraph 3, form No. 735.]

[Concluding part.]

FORM No. 770—By endorsee or bearer of check against drawer.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant made his check, in writing, of that date, and directed the same to the Bank of , thereby requiring said bank to pay to one L. M. or order [or bearer] \$.

2. That the defendant then and there endorsed the same to this plaintiff.

3. That thereafter [or on the day of , 19 ,] the same was duly presented to said bank for payment, but was not paid, due notice of which was given to the defendant.

4. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 771—By endorsee or bearer of check against drawer and endorser.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , at , the defendant Y. Z. made his check in writing of that date, and directed it to the bank of C. D., thereby requiring the said C. D. to pay to the defendant W. X. or order [or bearer] \$, and delivered it to the defendant W. X.

2. That thereupon the said W. X. endorsed the same to this plaintiff for value.

3. That the said check was duly presented for payment, but payment thereof was refused, due notice of which was given to the defendants.

4. [Same as paragraph 3, form No. 735.]
[Concluding part.]

FORM No. 772—Omission to give notice excused.

[Title of court and cause.]

1. [As in preceding form.]

2. That thereafter [or on the day of , 19 ,] the same was duly presented to said [drawee] for payment, but the defendant had no funds with said drawee.

3. [Same as paragraph 3, form No. 735.]
[Concluding part.]

§ 345. ANSWERS.

FORM No. 773—Defense of payment before endorsement.

[Title of court and cause.]

Defendant answering plaintiff's complaint [or petition], alleges:

1. That after the bill mentioned therein was due, and while the said [drawer] was the holder thereof, and before this action was brought,

the defendant satisfied and discharged the principal and interest [and damages] due on said bill, by payment to the said [drawer].

2. That after said payment, and not before, said [drawer] endorsed said bill to the plaintiff.

[Etc.]

FORM No. 774—Defense of no consideration.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition], and alleges:

1. That the note mentioned therein was given by the defendant solely for and on account of certain goods [here describe], sold and delivered to the defendant by the plaintiff, and without any other consideration therefor.

2. That the plaintiff was not the owner of said goods so sold and delivered to the defendant, but the same were the property of one C. D., who, on the day of , 19 , recovered said property from the defendant in an action of replevin; that the defendant has received no consideration for said note.

[Etc.]

FORM No. 775—Defenses of want of consideration and fraud.

(In *Fifth National Bank v. Edholm*, 25 Neb. 741, 742; 41 N. W. 776.)

[Title of court and cause.]

[Introductory part.]

1. Defendants admit that they made and delivered to of , their certain promissory note, but deny that the plaintiff in due course of business, or for a valuable consideration, and before maturity, purchased the said note.

2. Defendants allege the fact to be that said note was made, executed, and delivered under the following circumstances: That on , 19 , they, the defendants, had made, executed, and delivered their certain promissory note in the sum of \$ to , of , payable in days thereafter; that before said note became due defendants applied for and obtained permission to renew the same, with instructions to pay, when presented at the bank of the city of , the amount due, and to draw a sight draft upon the said in a like sum, at the same time sending the new note, with interest added; that defendants paid said first-mentioned note when pre-

sented as aforesaid, and drew their draft as agreed, which draft was dishonored, and has never been paid; that defendants have not received any consideration for the note sued upon in this action, and that the same was obtained by fraud and undue means [here, ordinarily, the circumstances of such fraud and undue influence should be set forth]; that said note appears to have been endorsed over by said and , of , who have made a pretended transfer to this plaintiff for the sole and only purpose, as defendants [are informed and] believe [and upon such information and belief aver], of suing upon the same for the benefit of said .

[Etc.]

FORM No. 776—Defense of no consideration based upon false warranty of goods sold.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

1. That the note mentioned therein was given by the defendant solely for and on account of certain goods called , sold and delivered to the defendant by the plaintiff, and without any other consideration therefor.

2. That said goods were purchased by the defendant, as the plaintiff then well knew, for the purpose of [here state], and the plaintiff, as part of the contract of sale and consideration of said note, warranted and represented that said goods were fit and proper and suitable for such purpose.

3. That the defendant accepted and purchased said goods for the purpose of [here state], trusting in the said representations and warranty of the plaintiff, as the plaintiff well knew.

4. That the said goods were not fit or proper for said purpose, the same being [state defect], and have always been, and are altogether, useless to the defendant.

5. That as soon as the defendant discovered the defective character of said goods for the purpose aforesaid, he notified the plaintiff thereof, and offered to return them, and this the defendant is still ready and willing to do.

[Concluding part.]

FORM No. 777—Defense that note was executed for a pre-existing indebtedness, and endorsed by an officer of a corporation without consideration.

(In *Lovejoy v. Citizens' Bank*, 23 Kan. 331.)

[Title of court and cause.]

Defendant admits the execution by defendants of the note on which the plaintiff sues, and the endorsement by this defendant of his name on the back thereof, but he says said note was not executed to this defendant, but to the plaintiff in the name of this defendant, as [an officer, to wit, the] president of the plaintiff, and was so executed because it was customary for plaintiff to take notes of its debtors in the name of one of its officers as payee; that it was executed in consideration of a pre-existing and overdue indebtedness of the defendants and to the plaintiff, and not for the purpose of procuring credit for this defendant, nor for this defendant [in any respect whatsoever], nor for any consideration other than said pre-existing and overdue indebtedness; that afterwards, without any consideration or benefit whatever moving between the plaintiff and the defendants, or between the plaintiff and any one else, but merely in accordance with the custom of the plaintiff, this defendant, as president of the plaintiff, and not otherwise, endorsed his name on the back of said note; that at no time was this defendant the owner and holder of said note, nor was any other person than plaintiff the owner and holder thereof at any time, and the said endorsement of said note by this defendant was wholly without consideration.

[Concluding part.]

FORM No. 778—Defense of fraud in procuring note.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition], and alleges:

1. That the note mentioned therein was procured by the plaintiff from this defendant by fraud and false representations [setting out what they were].

2. That the said representations were then known by the plaintiff to be false, and were made by him with intent to deceive and defraud this defendant.

3. That the defendant relied upon the same, and, believing them to be true, executed said note; that defendant received no consideration therefor.

[Etc.]

FORM No. 779—Defense of mistake in amount of note.

[Title of court and cause.]

That said note was given upon a settlement of account between the defendant and the plaintiff, and was intended by them to be made and received for the sum of \$, then claimed by the plaintiff to be the amount due him from the defendant; but that when said note was made it was, by mistake of the parties, given for the sum of \$, mentioned in the complaint, instead of the sum of \$, which was all that was due; and as to the excess, to wit, \$, the same is without consideration.

[Concluding part.]

FORM No. 780—Defense that acceptance was for accommodation.

[Title of court and cause.]

The defendant answering the complaint [or petition] of the plaintiff, alleges:

That the bill mentioned therein was accepted by this defendant solely for the accommodation of the plaintiff, and that there never was any value or consideration for the acceptance or payment of said bill by the defendant.

[Etc.]

FORM No. 781—Defense that defendant was a married woman, and signed the note as surety only for her husband.

(From *Emerson Co. v. Knapp*, 90 Wis. 34; 52 N. W. 945.)

[Title of court and cause.]

That at the time this defendant executed the note described in the complaint herein, she was, and still is, a married woman, and the wife of J. K., and that the said J. K. executed said note as principal maker in payment of a debt then owing by him individually to the plaintiff, and for no other consideration, and that this defendant thereupon signed said note at the request of, and as surety for, her

said husband, and not otherwise, and this defendant received no consideration for said note, nor did the same in any way concern her separate property or business.

[Concluding part.]

FORM No. 782—Defense of unauthorized and fraudulent acceptance.

[Title of court and cause.]

The defendants, for answer to the complaint [or petition] of the plaintiff herein, allege:

That the bill mentioned therein was made without the authority or consent of these defendants, out of the course of their regular business, and without consideration to them, accepted in their name by one C. D., fraudulently pretending to act under their authority, but in fact having no authority to accept the same.

[Etc.]

FORM No. 783—Defense of alteration of instrument. (In general.)

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition], and alleges:

That after the making and issue of said note, and before this action, the same was altered in a material part without the knowledge or consent of this defendant by [here state the alteration made].

[Etc.]

FORM No. 784—Defense based upon material alteration in note by changing the name of the payor.

(In *Horn v. Newton City Bank*, 32 Kan. 518; 4 Pac. 1022.)

[Title of court and cause.]

The defendants say that the note sued on in this action was originally executed by them to X. Y., but that since its said execution the same has been altered and so changed as to make it payable to Y. Z.; that said change was made without the knowledge or consent of these defendants, and is in fraud of their rights, and was so changed and assigned to the plaintiff for the purpose of preventing them from pleading thereto a failure of consideration and other equitable defenses existing against said note in favor of these defendants; that by reason of said change, which is material and fraudulent upon the rights of these defendants, said note has become absolutely void.

[Etc.]

**FORM No. 785—Defense that note was given for losses sustained by sale of
“options on 'change,” a fictitious and gambling transaction.**

(In *Sprague v. Warren*, 26 Neb. 326; 41 N. W. 1113; 3 L. R. A. 679.)

[Title of court and cause.]

[After introductory part:]

1. That heretofore, on the day of , 19 , plaintiffs were commission merchants in .

2. That plaintiffs at said time, under the firm name of , dealt and traded in what are known as “options on 'change” in , grain, by selling and buying in market, on 'change, certain grain for future delivery, when, in fact, no delivery was ever intended or demanded, and no grain was bought or sold or intended to be.

3. That on said day defendant took an “option” of said plaintiffs on grain as aforesaid, for future delivery, when, in fact, no delivery was ever intended or demanded, and no grain was bought or sold or intended to be.

4. That the whole transaction was a venture and speculation on margins, depending for profit or loss on the fluctuations of the market, and was wholly a fictitious and gambling transaction.

5. That in such transaction no consideration was received.

6. That the said note sued upon herein was given for losses in so trading in said “options” at said time as aforesaid, and is without consideration and wholly void, which plaintiffs well knew, and in violation of the law and contrary to public policy.

[Concluding part.]

FORM No. 786—Defense of usury in making note.

[Title of court and cause.]

[After introductory part:]

1. That defendant gave to the plaintiff the note mentioned in said complaint in pursuance of an agreement between the plaintiff and defendant that the plaintiff should lend the defendant the sum of \$, from the day of , 19 , until the day of , 19 , upon interest at the rate of per cent per annum.

2. That the defendant received from the plaintiff \$ only as consideration for the said note, the plaintiff retaining \$ as interest thereon. [Or allege the facts showing any other manner by which usury was exacted.]

[Concluding part.]

FORM No. 787—Defenses—(1) denials, (2) dishonoring of drafts due to acts of plaintiff, (3) that value of property was offset by value of drafts, (4) payment, (5) wrongful diversion of surplus money which should have been applied to payment, (6) non-observance of instructions and failure to enforce lien, (7) failure to deliver agreed security.—Action upon guaranty of drafts with bills of lading attached.

(In *First National Bank v. Bowers*, 153 Cal. 95; 94 Pac. 422.)

[Title of court and cause.]

Now comes defendant, and for answer to plaintiff's second amended complaint, as amended, admits, denies, and avers as follows:

[General defense of denial.]

As a first defense:

1. Admits that on the 1st day of December, 1897, defendant signed and delivered to plaintiff the written instrument in the words and figures set forth in plaintiff's second amended complaint, as amended, but denies that there was a good or valuable, or any consideration at all therefor; admits that the letters "B/L" in said instrument mentioned, were intended and understood by both plaintiff and defendant, at the time of the making and execution of said instrument, to represent and to express the words "bill of lading."

2. Denies that the words "face of all drafts" in said instrument set forth, at the time of the making and execution of said instrument, or at any other time, or at all, were understood by plaintiff and defendant herein, or were understood by plaintiff or defendant, to mean the face of each and every draft for oranges, with bill of lading attached, drawn by the Haight Fruit Company, in favor of the First National Bank of Redlands, during the orange season of 1897 and 1898, or that the same were understood by either plaintiff or defendant to mean the face of each draft, or any draft, so drawn during said season; denies that it was understood that said words "face of all drafts" meant each draft and every draft, or meant each draft or any draft, so drawn during said season; denies that said instrument was signed by defendant, and accepted by said First National Bank of Redlands, or that said instrument was signed by defendant, or that the same was accepted by plaintiff, with such understanding as to the significance of the said instrument.

3. Defendant avers that she has no information or belief upon the subject sufficient to enable her to answer any of the allegations

contained in the fifth paragraph of said complaint, and, placing her denial of all of the allegations contained in said paragraph on that ground, she denies each and every allegation in said paragraph contained.

4-8. [Here follow similar denials of allegations contained in paragraphs 6, 7, 8, 9, 10, and 11, of the complaint.] ¹

[Defense of dishonoring of drafts due to wrongful acts of the plaintiff.]

And for another, further, and separate defense to plaintiff's alleged cause of action, defendant alleges:

1. That prior to and at the time of the execution by defendant of the instrument set forth in plaintiff's second amended complaint, and as an inducement and consideration leading her so to do, and without which she would not have executed said instrument, the plaintiff represented to defendant that by the terms of said instrument it was understood, and it was in fact understood, to be the effect of the terms of said instrument that by the attaching of the bills of lading therein mentioned to any such drafts that might be drawn in favor of plaintiff by the said Haight Fruit Company, a lien to the amount of the drafts so attached to said bills of lading would be created against the oranges consigned and represented by said bills of lading, and that defendant's liability, if any, under the said instrument was conditioned upon a deficiency remaining unpaid after the exhaustion of the security afforded by said bills of lading; that she should be liable for only 90 per cent of the total amount of the face of all drafts so drawn during the orange season of 1897 and 1898, and not for 90 per cent of the face of each and every draft.

2. That as to all the drafts mentioned in said second amended complaint, upon which defendant's liability as guarantor or otherwise is alleged, the plaintiff, without the consent or knowledge of defendant, permitted the said Haight Fruit Company and the railroad companies issuing the bills of lading attached to said draft, to wrongfully and without authority, divert said consignments to other consignees and other destinations than as represented by said bills of lading; that by reason of such wrongful diversion and non-delivery of such oranges to the respective consignees, in said bills of lading named, said drafts were, and each of them was, dishonored by the respective

¹ The complaint in the action of First National Bank of Redlands v. Bowers, *supra*, is given in form No. 788, p. 1390, for the purpose of fully disclosing the issues raised by the pleadings in the case, and illustrating the various defenses in the answer, form No. 787.

drawees or drawee therein named, and that by reason of such unlawful and wrongful diversion and non-delivery of such oranges the plaintiff was deprived of, and plaintiff consented to and negligently suffered and permitted itself to be deprived of, the said liens upon such oranges securing said drafts, which said liens were, under the terms of said instrument, and understood as aforesaid by both plaintiff and defendant, to inure to the benefit of defendant, and without the exhaustion of which no liability would accrue to defendant on said drafts; that defendant was not notified of the non-payment or non-acceptance of any of said drafts; and that each and all of said diversions and non-deliveries were so made and permitted by said plaintiff without the consent or knowledge of defendant.

3. That plaintiff has never taken any steps to recover from said railroad companies, or any of them, or from said Haight Fruit Company, damages for such unlawful diversion and non-delivery, but has at all times negligently failed, neglected, and refused, and now negligently fails, neglects, and refuses, to take any steps whatsoever to protect defendant in the application of such liens on said oranges to such drafts, or any of them, or to recover from said railroad companies, or said Haight Fruit Company, or the several parties to whom respective shipments of oranges were diverted, the value of the liens or interest in said oranges, of which benefit the defendant was deprived by reason of such wrongful diversion and non-delivery; but that, on the contrary, the plaintiff has, during all the times in this answer mentioned, wrongfully and unlawfully conspired with the said railroad companies and said Haight Fruit Company to divert said oranges from the consignees and destinations respectively named in said bills of lading and the persons upon whom said drafts were drawn, and to render said bills of lading worthless and of no effect as securities for the payments of the drafts respectively accompanying them.

[Defense that value of property represented by bills of lading offset value of drafts.]

And for another, further, and separate defense to plaintiff's alleged cause of action, defendant avers:

1. That she hereby repeats, and makes a part of this defense, all the statements contained in paragraphs 1, 2, and 3 of her second defense herein stated.

2. And, upon information and belief, defendant alleges that the oranges represented by said bills of lading were equal in value to the amounts of the face of the respective drafts to which the same were attached.

[Defense of payment.]

1. And for another, further, and separate defense, defendant, upon information and belief, alleges that prior to the commencement of this action the said Haight Fruit Company paid to the plaintiff herein the full amount due upon each and all of the said drafts.

[Defense of wrongful diversion of surplus moneys which should have been applied on drafts.]

And for another, further, and separate defense, defendant, upon information and belief, alleges that of each and every of such drafts drawn during said season by said Haight Fruit Company, in favor of plaintiff, with bills of lading attached, other than those named in plaintiff's complaint to have been unpaid, the plaintiff received the face value thereof from the drawees respectively named therein; that upon each of such drafts so paid the plaintiff had advanced to said Haight Fruit Company 90 per cent of the face value thereof, and no more; that as to such remaining ten per cent, the surplus received by the plaintiff on such drafts so paid, the plaintiff, without the consent and against the will of defendant, wrongfully failed and neglected to apply such surplus to the deficiency existing in those cases set forth in plaintiff's complaint where drafts were not paid, and failed and neglected to hold such surplus to meet such deficiency should the same thereafter arise during said season, but wrongfully and negligently permitted the said Haight Fruit Company to apply such surplus money on other indebtedness than that arising by reason of the non-payment of said drafts, and did itself sequester and apply certain of the said surplus fund, the exact amount whereof is to this defendant unknown, to other indebtedness owing by said Haight Fruit Company to said plaintiff, so that all of said surplus fund was exhausted, and none of it was applied upon any of the unpaid drafts, or any part thereof, mentioned in said complaint; that said surplus fund was sufficient to have fully paid all the drafts unpaid by the respective drawees thereof, or otherwise, and for the non-payment of which the plaintiff brings this action. And the defendant, upon her

information and belief, alleges that at all times during said orange season there were other general funds belonging to the said Haight Fruit Company, and deposited with plaintiff, which were within the power of plaintiff to have sequestered and applied to and upon said unpaid drafts, but that plaintiff wrongfully, and without the consent and against the will of defendant, failed, neglected, and refused to so sequester and apply such other and general funds of said Haight Fruit Company to the payment of said unpaid drafts, or any of them.

[Defense of non-observance of instructions accompanying drafts, and failure to enforce lien upon bills of lading.]

For another, further, and separate defense to plaintiff's alleged cause of action, defendant avers:

1. That she hereby repeats and makes a part of this defense all of the statements contained in paragraphs 1, 2, and 3 of her second defense herein stated.

2. That defendant is informed and believes, and upon such information and belief alleges the fact to be, that the said Haight Fruit Company made a part of each and every draft drawn by it, and mentioned in paragraph 9 of plaintiff's second amended complaint, as amended, a certain printed form of instructions, and that each of said drafts was received by plaintiff with said instructions pinned thereto, and constituting a part thereof, and subject to the terms of said instructions; and that plaintiff, for itself and for its collecting agents and correspondents, to whom said drafts were forwarded by plaintiff for presentment to the respective drawees therein named for acceptance or for payment, agreed with said Haight Fruit Company to abide by said printed instructions; and that each and every of said drafts was sent to the collecting agents and correspondents of plaintiff with said instructions thereon constituting a part thereof. That said printed instructions which were so pinned on and made a part of each of said drafts contained, among other things, the words and figures following, to wit: * * * "Instructions to the bank. * * * This collection covers goods now due in your city. Please present for acceptance without delay, but hold until goods arrive if necessary. Do not return the documents unless instructed from California to do so. Permit inspection on track. If not accepted immediately on arrival of goods, wire direct to Haight Fruit Company of Redlands, Cal., and follow their instructions. If not paid promptly

at maturity, wire bank to which this collection is made payable, with exchange and collection charges. Draft drawn with exchange and charges and must be paid; differences regarding same to be adjusted between payor and Haight Fruit Company. Allow 1½ per cent discount for cash."

3. That by the terms of said instructions the plaintiff consented to the direction of the said Haight Fruit Company that the plaintiff and its said collection agents might present any such draft to the drawee thereof, and the consignee of the bill of lading attached thereto should not return such draft or bill of lading in the event that such draft was dishonored by non-acceptance or non-payment, unless directed to do so by said Haight Fruit Company, and that in each and every instance where said drafts were dishonored neither the said Haight Fruit Company nor plaintiff herein gave, or caused to be given, any instructions for the return of such dishonored drafts and bills of lading attached thereto, but that plaintiff permitted and consented to the said Haight Fruit Company negligently allowing said dishonored drafts and the bills of lading attached thereto to remain in the hands of such collecting agents, and such Haight Fruit Company and plaintiff each neglected and refused to take any steps to enforce the lien existing upon such bills of lading and the fruit represented thereby for the payment of the drafts respectively attached to such bills of lading, and at all times have failed, neglected, and refused to seek satisfaction against the railroad companies issuing such bills of lading or delivering the fruit represented thereby. That by the terms of said instructions the plaintiff authorized and permitted the said collecting agents and correspondents to deliver the bills of lading attached to any such draft to the drawee named in such draft, upon the acceptance of such draft, and that such authorization was in violation of the terms of the alleged guaranty sued upon in this action, whereby the respective bills of lading attached to such drafts were only to be delivered to the drawee in such draft named upon the payment, and not upon the acceptance, of such draft; and that the bills of lading attached to each and every of the drafts mentioned in paragraph 9 of plaintiff's second amended complaint were delivered to the drawee in such drafts named upon the acceptance, and before the payment, thereof. That by the terms of said instructions the plaintiff consented to and authorized such collecting agents, in the event such drafts were not accepted immediately upon the

arrival of the goods against which such drafts were drawn, to wire direct to said Haight Fruit Company, and to follow the instructions that might be given by said Haight Fruit Company in regard to the disposition of the goods against which drafts were drawn, and that in each and every instance in which said drafts were not accepted such collecting agents wired for instructions to said Haight Fruit Company, and said Haight Fruit Company directed the disposition of the fruit against which such dishonored drafts were drawn, regardless of the outstanding bill of lading which secured the payment of such dishonored drafts; and that plaintiff negligently permitted and authorized the disposition by said Haight Fruit Company of the fruit represented by such bill of lading, without requiring that such outstanding bill of lading be delivered up and the fruit sold and the proceeds applied in payment of the advances made by plaintiff and guaranteed by defendant upon such dishonored drafts.

4. [Here follow averments of agreements entered into between the Haight Fruit Company and the railroad companies, whereby the provisions as to said bills of lading were rendered ineffectual, and thereby the said bills of lading were rendered worthless as security, and alleging that the plaintiff knew of said arrangement whereby the fruit was subject to disposition upon the order of said Haight Fruit Company regardless of the bills of lading, and that the alleged guaranty sued upon in the action was abandoned maliciously and fraudulently and with intent to deceive the defendant in this and other respects; that by reason of said agreements existing between the said Haight Fruit Company and the railroad companies, "or of the conspiracy existing between said Haight Fruit Company and the said plaintiff, to deprive the defendant of the security which should have been afforded her," etc., defendant did not know and did not have any means of obtaining knowledge of the facts, etc.]

[Defense based upon failure to deliver agreed security for acceptance and payment.]

And for another, further, and separate defense, defendant avers:

1. That at the city of Redlands, San Bernardino County, state of California, on or about the respective dates upon which this plaintiff alleges in paragraph 9 of its second amended complaint, as amended, plaintiff advanced 90 per cent of the face value of each of those certain drafts of the Haight Fruit Company, drawn in favor of plaintiff,

and in said paragraph 9 specifically enumerated, the defendant was on each of said respective dates entitled to have said bill of lading and the oranges represented by each bill of lading that was attached to each of said drafts held by plaintiff as security for the acceptance and payment of said drafts.

2. That thereafter, and on or about the said respective dates, and while the defendant was so entitled to have said bills of lading, and the oranges represented thereby, held by plaintiff as security for defendant as aforesaid, at the said city of Redlands, plaintiff, without the consent or knowledge of defendant, took each of said respective bills of lading, and all the oranges represented thereby, and converted each of said respective bills of lading, and all of the oranges represented thereby, to its own use.

3. That each of said bills of lading, with the oranges represented thereby, so wrongfully taken and converted by plaintiff to its own use, was at the time and place of said conversion worth more than the face value of the draft to which such bill of lading was attached.

Wherefore, the defendant prays that the plaintiff take nothing by its complaint in this action against defendant, and that defendant have and recover of plaintiff her costs herein expended.

Edward R. Annable,
Hunsaker & Britt,

[Verification.]

Attorneys for defendant.

FORM No. 788—Action upon guarantee of drafts with bills of lading attached.

(In First National Bank of Redlands v. Bowers, 153 Cal. 95; 94 Pac. 422.)

[Title of court and cause.]

Now comes the plaintiff above named and, by leave of court first had and obtained, files this its second amended complaint, as amended, and for cause of action alleges:

1, 2. [Averments as to incorporation of plaintiff company, and of the Haight Fruit Company.]

3. That the said Haight Fruit Company was during the years 1897 and 1898, and for many years prior thereto, had been engaged in the business of dealing in fruits in southern California, buying, selling, packing, and shipping the same to the various markets of the United States and Canada, and having its principal place of business in the city of Redlands, and dealing largely in the citrus fruits of southern California, and that being desirous of financial assistance to enable it to carry on its said business for the season of 1897 and 1898, applied to plaintiff herein to furnish it the funds for that purpose; that the plaintiff agreed to make such advancements to the said Haight Fruit Company for the said season of 1897 and 1898, in the event that the same should be guaranteed by a good and sufficient guarantor; that the defendant herein, in consideration of such advances, and to obtain funds for the said Haight Fruit Company to carry on the said business, and for divers other good and valuable considerations, did, on the 1st day of December, 1897, execute to this plaintiff a written guaranty in the words and fig-

ures following, to wit: "Redlands, Cal., Dec. 1st, 1897. To the First National Bank of Redlands, Cal. I hereby guarantee to said bank 90 per cent of the face of all drafts for oranges, with B/L attached, and drawn by the Haight Fruit Co. in favor of said First National Bank, during the season of 1897 and '98. Gertrude S. Bowers."

4. That the letters "B/L" in said guaranty mentioned were intended and understood by both plaintiff and defendant, at the time of the making and execution of said guaranty, to represent and express the words "bill of lading"; that the words in said guaranty set forth, to wit, "face of all drafts," at the time of the making and execution of said guaranty, were understood by both plaintiff and defendant herein to mean the face of each and every draft for oranges, with bill of lading attached, drawn by the Haight Fruit Company in favor of the First National Bank of Redlands during the orange season of 1897 and 1898, and it was with that understanding as to the significance of said guaranty that the same was signed by defendant and accepted by said First National Bank of Redlands.

5. That thereafter, and during the time referred to in said written guaranty, to wit, during the orange season of 1897 and 1898, the Haight Fruit Company packed and shipped various carloads and lots of oranges to various and divers persons in various parts of the United States, and made drafts upon the respective parties to whom said lots and carloads of oranges were shipped for the purchase price of said respective lots and carloads when the same had been sold, and for about three-fourths of the value of said carloads when shipped to their agents for sale, which drafts were drawn in favor of plaintiff or its order, and attached to each of said drafts was the bill of lading for each respective lot or carload of oranges so shipped as aforesaid; that all of said drafts were drawn by said Haight Fruit Company in favor of plaintiff, or order, and were payable, in some instances in thirty, others in fifteen days, after date, and in some instances on sight, and others at so many days after sight.

6. That said drafts were all substantially in the following form, save and except only as date and number of draft, number of car, name of drawee, amount, and date of maturity of said drafts, to wit: "Established 1889. Haight Fruit Company, incorporated. Packers and shippers. Oranges, raisins, dried fruits. Redlands, Cal., May 12, 1898. Thirty days after date, pay to the order of First National Bank of Redlands \$500.00, with exchange. Value received and charge to account of Haight Fruit Co. By L. G. Haight. To Charles H. Parsons Fruit Co., New York. Car No. 8620. F. X. Trademark, Haight Fruit Co., California."

7. That forthwith, on the making of the said drafts respectively, the Haight Fruit Company delivered the same to plaintiff herein with the bills of lading attached, and that plaintiff, upon said delivery to it respectively as aforesaid, forthwith in every instance forwarded said drafts, with the bills of lading attached respectively, through its regular business correspondents for presentment, acceptance, and payment, to the various parties respectively upon whom said drafts respectively were drawn.

8. That forthwith upon the delivery to plaintiff of each of said drafts respectively by the said Haight Fruit Company as aforesaid, plaintiff advanced to said Haight Fruit Company, in consideration of said draft, and of the delivery of the same as aforesaid, and upon consideration of and upon the faith of said guaranty, 90 per cent of the face value of said drafts respectively so drawn and delivered as aforesaid; that all of the drafts drawn by said Haight Fruit Company as hereinbefore referred to, excepting the drafts under paragraph 11 hereof set forth, were paid by the respective parties upon whom the same were drawn, or by the Haight Fruit Company, and defendant herein has never paid 90 per cent, or any per cent, or any sum whatever, upon any draft whatever, ever drawn by said Haight Fruit Company upon any of the persons to whom it had made sales of oranges for the orange season of 1897 and 1898 as hereinbefore set forth, or upon any draft in this complaint set forth or referred to.

9. That among the drafts so drawn by said Haight Fruit Company, and delivered to plaintiff as aforesaid, and upon which plaintiff advanced to said Haight Fruit Company 90 per cent of the face value thereof as aforesaid, were the following, to wit: (1) a draft for \$500, drawn February 2, 1898, on the Charles H. Parsons Fruit Company at New York, in the state of New York, payable to plaintiff, or order, fifteen days after date, and on which an advancement of 90 per cent of its face value was made by said plaintiff to said Haight Fruit Company on February 2, 1898. [Here follow similar designations of thirty-seven other drafts drawn, upon which advancements of 90 per cent of the face value thereof were made by the plaintiff to the said Haight Fruit Company.]

Plaintiff alleges that, in addition to the drafts last hereinbefore set forth under this paragraph, there was drawn by the Haight Fruit Company, on various persons during the said season of 1897 and 1898, various drafts, amounting to the said drafts specified, in the aggregate the sum of \$144,501.68, and to each of said drafts a bill of lading was attached, and all of said drafts were drawn for oranges, and during the said fruit season, and the plaintiff did advance to the said Haight Fruit Company upon each and all of said drafts 90 per cent thereof, making the whole amount so advanced upon said drafts and under and in pursuance of defendant's guaranty, and upon the faith and in consideration thereof, the sum of \$130,051.52. And plaintiff avers that of the said sum so advanced by it, being 90 per cent of the face value of said drafts, there has been repaid to the plaintiff, either by the persons upon whom said drafts were drawn or by the Haight Fruit Company, the sum of \$117,521.62, and no more, leaving a balance due to the plaintiff upon said advancements so made by it to the said Haight Fruit Company, during the time and for the purposes aforesaid, of the sum of \$12,529.92, no part of which has ever been paid, but the whole thereof was on the 2d day of September, 1898, due to the plaintiff and unpaid, and has ever since remained so due and unpaid.

10. That none of the drafts in the said 9th paragraph specified, nor any part thereof, was ever paid by the drawees therein named, or by any other person, and the same now are and remain wholly owing, due, unpaid, and unsatisfied. And plaintiff further avers that all of the said drafts, and each of them, so delivered to the plaintiff and drawn in plaintiff's favor by the said Haight Fruit Company during the said fruit season of 1897 and 1898, and drawn for oranges and delivered to plaintiff with the bills of lading attached, were forthwith forwarded by the plaintiff with bill of lading attached to its regular correspondent located nearest the drawee in each respective draft named for presentment, acceptance, and collection, and in each instance of said drafts so forwarded for collection as aforesaid the plaintiff was promptly notified of the non-acceptance and non-payment of the said drafts, and forthwith upon its, plaintiff's, receipt of the said notification of such non-acceptance and non-payment of said drafts respectively, plaintiff notified said Haight Fruit Company of said non-acceptance and non-payment. And plaintiff further avers that a large portion of said drafts so drawn by the said Haight Fruit Company in favor of plaintiff, and delivered to it with the bill of lading attached, were drawn by the said Haight Fruit Company upon its own agents, employed by it in the markets of the United States, and the bills of lading made to and endorsed to the said agents to enable them to make the sales of the carloads of oranges to which they referred; that others of said bills of lading were made to persons purchasers of said fruit, and the drafts drawn on the said purchasers or upon the agents of the said Haight Fruit Company respectively, were forwarded with said bills of lading; that of the said drafts mentioned in paragraph 9, all drawn upon Charles H. Parsons Fruit Company at New York, in the state of New York, and upon N. A. Coble & Co. at Chicago, and upon A. S. Brown & Co. at Boston, were drawn upon the said Haight Fruit Company's agents or brokers in said city, the said persons named being the agents and brokers employed by the said Haight Fruit Company to find purchasers and to make sales.

11. That the aggregate amount of the principal sums mentioned in said drafts so drawn by said Haight Fruit Company to the order of plaintiff as aforesaid, and

unpaid, being the drafts heretofore under said paragraph 9 respectively set forth and enumerated, is the sum of \$14,937.40, of which sum 90 per cent is \$13,443.66; that of said \$13,443.66 the sum of \$913.74, and no more, has been paid to plaintiff by said Haight Fruit Company, and there now is and remains owing and unpaid to plaintiff upon the said 90 per cent of the principal sums of said drafts the sum of \$12,529.92; that on the 2d day of September, 1898, and on various other and subsequent days and times, plaintiff has demanded the payment to it, plaintiff, of the said sum of \$12,529.92, but defendant has at all times neglected and refused, and now neglects and refuses, to pay plaintiff the said sum of \$12,529.92, or any part thereof, and said sum of \$12,529.92, together with interest thereon from the 2d day of September, 1898, the date of plaintiff's said demand upon defendant as aforesaid, now is and remains wholly due, owing, and unpaid by defendant to plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$12,529.92, together with interest thereon at the rate of seven per cent per annum, from the 2d day of September, 1898, and for its costs herein.

J. S. Chapman,
Otis & Gregg,
Attorneys for plaintiff.

[Verification.]

[In the foregoing action judgment was rendered for defendant and affirmed on appeal. Upon the first appeal in this case the court held that the wording of the guaranty was not so plain, unambiguous, and certain as to have justified the court in refusing evidence explanatory of it: First National Bank v. Bowers, 141 Cal. 253, 74 Pac. 856.]

FORM No. 789—Denial of endorsement.

[Title of court and cause.]

The defendant answering the complaint [or petition] of the plaintiff, denies that he ever at any time endorsed the promissory note [or bill] mentioned in said complaint [or petition].

FORM No. 790—Denial of acceptance.

[Title of court and cause.]

The defendant answering the complaint [or petition] of the plaintiff herein, denies that he made the promissory note [or accepted the bill] mentioned in the complaint [or petition], or any note [or bill], made [or drawn] in favor of the payee [or drawee] named.

FORM No. 791—Denial of acceptance, presentment, and protest.

[Title of court and cause.]

The defendant answering the complaint [or petition] of the plaintiff, denies:

That the bill of exchange mentioned therein was ever presented for acceptance or accepted as alleged, or at all, or that it was ever presented for payment, or protested for non-payment, as alleged in said complaint [or petition], or otherwise, or at all.

FORM No. 792—Denial of presentment.

[Title of court and cause.]

The defendant answering the complaint [or petition] of the plaintiff, denies: That the promissory note [or bill of exchange] mentioned therein was ever presented to C. D. for payment [or for acceptance] as alleged, or at all.

FORM No. 793—Denying excuse for non-presentment.

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition], denies:

That due or reasonable search was made when the said bill of exchange [or promissory note] became due and payable, to discover the person of the said , at , or elsewhere, or at all, in order that the said bill might be presented to the said for payment.

FORM No. 794—Denial of notice.

[Title of court and cause.]

The defendant denies that notice of the dishonor of the said promissory note [or bill], was given to the defendant, as alleged in the complaint herein, or otherwise.

FORM No. 795—Counterclaim in action upon promissory note.

(In *First National Bank v. Bews*, 2 Idaho 1175; 31 Pac. 816.)

[Title of court and cause.]

Defendant O. R. Young, by leave of the court first had and obtained, files his amended answer herein, and [for defense and counterclaim] ¹ says:

1. That, at the time of the execution of the note sued upon in this action defendants therein also executed a like note for the same amount to the firm of Willman & Walker, then of Hailey, Idaho, and secured the payment of both said notes by then and there executing

¹ The counterclaim in this form was held proper, and that therefore it was error to refuse to permit defendant to prove the facts alleged therein. The court stated that as it arose out of the same transaction, and was connected with the subject of the action, "it is a cause of action arising upon a contract, and existed at the commencement of the action, and therefore must be set up, or it is barred": *First National Bank of Hailey v. Bews*, 2 Idaho 1175, 31 Pac. 816, 818. See § 4185, Rev. Laws Idaho.

their mortgage to plaintiff's assignor and said firm of Willman & Walker, jointly, for the amount of both of said notes, on their certain real property then known as the "Hailey Merchants' Hotel," consisting of lots 19 and 20, of block 40, of the town of Hailey, with the improvements thereon, the whole thereof being then worth much over \$40,000.

2. That about the 1st day of June, 1888, the note sued upon in this action was assigned to plaintiff, and thereby it became the owner and holder of the same, and to the extent of said note is also owner in the mortgage aforesaid.

3. That to further secure said mortgagees and this plaintiff, on or about June 24, 1888, defendants aforesaid entered into an agreement with said mortgagees and this plaintiff to the following effect: That said mortgagors would put said mortgagees and this plaintiff in possession of the said property, with power to use or rent the same for the benefit of mortgagors, by using or renting the same to best advantage, and apply the proceeds thereof, first in payment of taxes legally levied and assessed thereon, next in keeping said property insured to an amount of not less than \$25,000, and then apply any overplus remaining after payment of taxes and premium on insurance aforesaid, first to the interest accruing on said notes, and next towards the principal, and so on, until all of said notes be fully satisfied; and in case of loss by fire before said notes were paid, then to apply so much of the insurance aforesaid as would be necessary to satisfy the same.

4. Thereupon said mortgagees and this plaintiff did agree with said mortgagors, defendants herein, to use or rent said property, collect the rents, pay the taxes, insure and keep the same insured for \$25,000, pay the insurance and principal out of said rents or insurance, in the manner and form as stated in the third paragraph of this answer.

5. Thereupon, the said mortgagees and this plaintiff having accepted and agreed to do and perform the matters and things as in said paragraph 4 of this answer stated and contained, and in consideration thereof, said mortgagees and this plaintiff were duly put in possession of the property aforesaid, and from said day, and continuously thereafter, said mortgagees and this plaintiff remained in possession of the same, used, rented, and collected the rents thereof, and applied the same to their own use.

6. That the said income so collected, and for the purpose aforesaid, largely exceeded the possible taxes and insurance premium aforesaid.

7. That on July 2d, and during mortgagees' and said plaintiff's possession, said property was consumed by fire, and was a total loss, and the insurance money which mortgagees and this plaintiff did recover under the insurance aforesaid largely exceeds any possible amount of both principal and interest on both of the notes aforesaid, and the same are fully paid, and a large amount over and above the same is due defendants.

Wherefore, [etc., prayer for allowance of amount found due the defendants and that the same be decreed a counterclaim, etc.].

C. D., Attorney for defendants.

[Verification.]

Plea of payment is set up in the foregoing form, and it is error to refuse to permit defendants to introduce evidence under such plea: *First National Bank of Halley v. Bews*, 2 Idaho 1175, 31 Pac. 816, 818.

Form of petition in an action to recover on a note: *Kemper v. Lord*, 6 Kan. App. 64, 49 Pac. 638.

Form of complaint in an action on a lost note: *Sauter v. Leveridge*, 103 Mo. 615, 618, 620, 15 S. W. 981.

§ 346. ANNOTATIONS.—Negotiable Instruments.

- 1, 2. Actions.—Copy of note in pleading.
3. Holder may sue in his own name.
4. Averment as to transfer.
- 5-7. Holding imports promise to pay.—Averment as to execution.
8. Promise to pay.—From what implied.
9. Promise to third party to pay upon a contingency.
10. Note falling due upon happening of contingency.
- 11, 12. Non-payment, averment as to.
- 13, 14. Place of execution of note.—When necessary to plead.
15. Attorneys' fees stipulated in note.
16. Defenses.—Note given in payment for interest in land.
17. As to holders other than those "in due course."
18. Issue as to security given.—How defense is raised under the statute.
- 19, 20. Payment as defense.—Under general denial.

1. ACTIONS.—Copy of note in pleading.—The material substance and legal effect of a note, read from the body of the complaint, without reference to the copy exhibited, may constitute a sufficient statement as against a general demurrer: *Ward v. Clay*, 82 Cal. 502, 504, 23 Pac. 50, 227. See *Phelps v. Owens*, 11 Cal. 25; *Slattery v. Hall*, 43 Cal. 195; *Berry v. Cammet*, 44 Cal. 352; *Reynolds v. Hosmer*, 45 Cal. 630; *Chase v. Evoy*, 53 Cal. 352.

2. A copy of a note referred to in the body of a complaint, and annexed to the complaint, might properly be referred to by the court for ascertaining the "words and figures" and the form of the note: *Ward v. Clay*, 82 Cal. 502, 505, 23 Pac. 50, 227.

3. Holder may sue in his own name.—"The holder of a negotiable instrument may sue thereon in his own name and payment to him in due course discharges the instrument": *Idaho Rev. Codes*,

§ 3508, construed with other sections in *Craig v. Palo Alto Stock Farm*, 16 Idaho 701, 102 Pac. 393, 394.

4. **Averment as to transfer.**—An averment of valuable consideration for the transfer from an original payee to the plaintiff is generally immaterial, as possession of a note, whether obtained before or after maturity, is prima facie evidence of ownership: *McCann v. Lewis*, 9 Cal. 246; *Meadowcraft v. Walsh*, 15 Mont. 544, 550, 39 Pac. 914.

5. **Holding imports promise to pay.**—Under the code system of pleading, it is not necessary to aver an express promise to pay in an action on a note: *Kansas City Nat. Bank v. Landis*, 34 Mo. App. 423; *Hammett v. Trueworthy*, 51 Mo. App. 281, 284; *Bick v. Yates*, 137 Mo. App. 268, 117 S. W. 650.

6. **The allegation in a complaint, "that defendant executed to plaintiff a promissory note,"** is equivalent to an allegation "that defendant made his note payable to plaintiff." An allegation that defendant executed to plaintiff his note in writing, or made his note in writing payable to plaintiff, includes and imports a delivery of the same to plaintiff: *Hook v. White*, 36 Cal. 299, 302, citing *Churchill v. Gardner*, 7 T. R. 597; *Russell v. Whipple*, 2 Cow. 536.

7. **Any averment of a continuous holding or ownership of a promissory note, after the allegation of the execution of the promissory note to plaintiff by the defendant, is deemed to be surplusage, inasmuch as the making and delivery of a promissory note, or the execution of such note, imports a liability to pay in accordance with its terms, without any averment of a continuous holding or ownership:** *Hook v. White*, 36 Cal. 299, 302. See *Wedderspoon v. Rogers*, 82 Cal. 571; *Poorman v. Mills*, 35 Cal. 118, 95 Am. Dec. 90.

8. **Promise to pay.**—From what implied.—An allegation that a promissory note was executed and delivered necessarily implies a promise by the maker to pay, and an allegation that such a note was executed and delivered to a person or persons named implies a promise to pay whomsoever is so named: *Bick v. Clarke*, 134 Mo. App. 544, 114 S. W. 1144, 1145.

9. **Promise of third party to pay upon a contingency.**—In an action on a prom-

issory note which a third party had agreed to pay upon confirmation of title of his grantor to certain lands, and in consideration of which promise plaintiff forebore to sue until the decision as to such title, neither such third party nor his grantee is a necessary party: *Smith v. Lawrence*, 38 Cal. 24, 99 Am. Dec. 344.

10. **Note falling due upon happening of contingency.**—A complaint, which among other things, alleges: "That at the time of the execution of said note, before delivery thereof, and as part of the consideration for the acceptance of said note by said Dunham, Fletcher & Coleman, the said R. H. Parker endorsed said note as follows: 'March 15, 1905. Should I make a transfer of my real estate before this note becomes due, I agree to pay same on demand. R. H. Parker.' That no part of the principal or interest of said note has been paid, except interest thereon from August 1, 1907, and no more. That said R. H. Parker has since the execution of said note made a transfer of his real estate, and said note, together with interest thereon from August 1, 1907, is now due and payable by him"; held, sufficient as against demurrer as stating the ultimate fact of transfer of the note, and as sufficiently showing that the note was due: *Loveday v. Parker*, 50 Wash. 260; 97 Pac. 62, 64.

11. **Non-payment, averment as to.**—In an action on a note, the plaintiff must allege its non-payment: *Scroufe v. Clay*, 71 Cal. 123, 124, 11 Pac. 882.

12. **In some jurisdictions it is not necessary to aver in a complaint that a note is unpaid:** *Keteltas v. Myers*, 19 N. Y. 231; *Gans v. Beasley*, 4 N. Dak. 140, 59 N. W. 714, 719.

13. **Place of execution of note.**—In an action upon a promissory note it is not necessary to allege the place where such instrument was executed, except where it is necessary to a recovery to show that the instrument sued upon was executed in another jurisdiction; and where the contrary is not shown, it will be presumed that the note was executed in the state where suit is brought: *Grimes v. Tait*, 21 Okla. 361, 99 Pac. 811, 812.

14. **When necessary to plead place of execution.**—Where plaintiff relies upon the laws of any foreign jurisdiction for recovery upon a promissory note, and

where the note neither discloses the place of its execution nor the place of payment, it is necessary to plead the place of execution of the note in controversy: *Grimes v. Tait*, 21 Okla. 361, 99 Pac. 811, 812.

15. **Attorneys' fees stipulated in note.**—In an action for attorneys' fees stipulated for in certain promissory notes sued upon, the complaint must allege all the facts necessary to show a contract to pay such fees, the contingencies, and the happening of those contingencies, upon which the agreement became absolute, such as placing the instrument in the hands of an attorney for collection, and the sum paid or contracted to be paid the attorney for his services: *Smith v. Chiles* (Tex. Civ. App.), 115 S. W. 598.

16. **DEFENSES.**—Note given in payment for interest in land.—It is no defense to a note given in consideration of a conveyance to the maker of all the interest of the payee in a certain tract of land, that the payee had no interest in the land, unless the sale was procured by the fraud of the payee, or by reason of mistake of such a character that equity would relieve the maker from its effects: *O'Sullivan v. Griffith*, 153 Cal. 502, 505, 95 Pac. 873, 96 Pac. 323; *Owens v. Thompson*, 4 Ill. 502; *Hulett v. Hamilton*, 60 Minn. 21, 61 N. W. 672.

17. A negotiable instrument in the hands of any holder other than a holder "in due course" is subject to the same defense as if it were non-negotiable: *Craig v. Palo Alto Stock Farm*, 16 Idaho 701, 102 Pac. 393, 394, construing Idaho Rev. Codes, § 3515.

18. **Issue as to security given.**—How defense is raised under the statute.—Where an action is commenced upon a promissory note, the plaintiff is prima

facie entitled to maintain his action, and the fact that the obligation upon which he sues is secured by mortgage is a matter of defense, the burden of which rests upon the defendant to make it appear by his pleading, and in doing so he must bring himself within the purview of the statute. It is not sufficient to bar the action that it appears that security has been given for the obligation. The security must appear to be in the form of a mortgage, or, adopting the most liberal view, to be what the law would deem the equivalent of a mortgage. The replication can not be construed to include personal or collateral security or any other form of security not falling within the meaning of that term. Allegations which merely amount to a statement that the plaintiff had taken security do not present an issue coming within the purview of the statute: *State Sav. Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692, 695.

19. **Payment as defense.**—Payment may be proved, though not averred, under an answer which denies that the debt is not paid in full or that there is now due from defendant to plaintiff any sum whatever: *Mickle v. Heinlen*, 92 Cal. 596, 28 Pac. 784. Compare: *Piercy v. Sabin*, 10 Cal. 22, 70 Am. Dec. 692; *Esbensen v. Hover*, 3 Colo. App. 467, 33 Pac. 1008; *Benicia Agricultural Works v. Creighton*, 21 Ore. 495, 28 Pac. 775, 30 Pac. 676; *Clark v. Wick*, 25 Ore. 446, 36 Pac. 165.

20. A general denial, under some authorities, has been held sufficient to enable defendant to prove payment: *Fairchild v. Amsbaugh*, 22 Cal. 572. See *Brooks v. Chilton*, 6 Cal. 640; *Frisch v. Caler*, 21 Cal. 71; *Brown v. Orr*, 29 Cal. 120; *Davanay v. Eggenhoff*, 43 Cal. 395; *Wetmore v. San Francisco*, 44 Cal. 294.

CHAPTER XCVIII.

Guaranty and Suretyship.

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§ 347. COMPLAINTS [OR PETITIONS].

FORM No. 796—By surety, for money paid on undertaking on appeal.

[Title of court and cause.]
The plaintiff complains of the defendant, and alleges:
1. That on the day of , 19 , one L. M. recovered judgment in the court of the county of , state of , against the defendant, for \$, from which the said defendant appealed to the court of .
2. That on the day of , 19 , at defendant's request, the plaintiff executed an undertaking on appeal, a copy of which is hereto annexed, marked "Exhibit A," and made a part hereof, in the sum of \$, conditioned to abide and perform the order and

judgment of said appellate court and pay all money, costs, and damages which might be required of or awarded against the said defendant.

3. That on the day of , 19 , the said judgment was affirmed by said [appellate] court, in the sum of \$ damages, and \$ costs.

4. That on the day of , 19 , the plaintiff was compelled to pay \$ upon said undertaking, the amount of said judgment, to the said L. M.

5. That said sum has not been repaid to the plaintiff, nor any part thereof.

[Concluding part.]

FORM No. 797—By surety, on lease, against principal.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on or about the day of , 19 , the defendant entered into an agreement, in writing, whereby he hired of L. M. the dwelling-house known as No. Street, in the city of , for the term of , agreeing to pay therefor, to the said L. M., the rent of \$ in equal [quarterly] instalments.

2. That, at the request of the defendant, the plaintiff made and delivered to the defendant his guaranty thereon, in writing, whereby the plaintiff guaranteed the faithful performance on the part of the defendant of the said agreement.

3. That the defendant delivered said agreement and guaranty to L. M., and thereupon, and in consideration thereof, obtained and had possession of said premises, pursuant to said agreement, whereby the defendant became liable to the said L. M. for the rent therein named.

4. That a portion of said rent, to wit, the instalment of \$, which became due on the day of , 19 , the defendant failed to pay.

5. That the plaintiff was compelled to pay, and did pay on the day of , 19 , at , to the said L. M., at his request, and to the use of defendant, the sum of \$, being the aforesaid sum, with interest.

6. [Same as paragraph 5, form No. 796.]

[Concluding part.]

FORM No. 798—On guaranty of antecedent debt.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one L. M. was then indebted to this plaintiff in the sum of \$.

2. That on the day of , 19 , at , the defendant made and subscribed a memorandum, in writing, of which the following is a copy: [Copy of guaranty], and delivered the same to the plaintiff, and thereby promised to the plaintiff to answer to him for said debt.

3. That the plaintiff duly performed all the conditions thereof on his part.

4. [Same as paragraph 5, form No. 796.]

[Concluding part.]

The plaintiff may properly join in his complaint the original obligor and the guarantor in an action upon the contract and guaranty thereof: *Senn v. Connelly* (S. Dak.), 120 N. W. 1097, 1098, citing S. Dak. Code Civ. Proc., § 101.

FORM No. 799—On agreement to answer for price of goods sold to a third person.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , in consideration that the plaintiff, at the request of the defendant, would sell to one L. M., on a credit of one year, such goods as said L. M. should desire to buy of this plaintiff, the defendant promised to be answerable to the plaintiff for the payment by said L. M. of the price of goods so sold on credit.

2. That this plaintiff afterwards, and on the faith of said guaranty, sold and delivered to the said L. M. [give description of goods], for the sum of \$, upon a credit of one year, of all which the defendant had due notice.

3. That payment of the same was thereafter, at the time of and after the expiration of said term of credit, demanded from said L. M., but the same was not paid, of all which due notice was given to the defendant.

4. That thereafter, to wit, on the day of , 19 , at , payment of the same was demanded by the plaintiff from the defendant, but the same has not been paid, nor any part thereof.

[Concluding part.]

FORM No. 800—Against principal and sureties on contract for work.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , at , articles of agreement were entered into between the plaintiff and the defendants, bearing date the day of , 19 , of which the following is a copy: [Set out copy.]

2. That the plaintiff afterwards duly performed all the conditions of the said contract on his part, and that the same was fully completed on the day of , 19 , and that on that day he was entitled to have and receive from the defendants upon said contract for said work mentioned in said agreement the sum of \$.

3. That the defendants have wholly failed to perform the said contract on their part, and have wholly neglected and refused to pay the said sum, or any part thereof.

[Concluding part.]

FORM No. 801—Against guarantor of mortgage, to recover foreclosure deficiency.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on or about the day of , 19 , the defendants entered into an agreement with the plaintiff, of that date, in the words and figures following: [Insert copy.]

2. That the principal sum secured by the note and mortgage referred to in the said agreement became due and payable on the day of , 19 , and that on or about [insert date] the plaintiff commenced an action in the court of the county of , in this state, for the foreclosure of the said mortgage; and such proceedings were thereupon had that on the day of , 19 , a decree was duly given and made by the said court, for the foreclosure of the said mortgage and sale of the premises; and that if the proceeds of such sale should be insufficient to pay the amount reported due to the plaintiff, with interest and costs, the amount of such deficiency should be specified in the report of sale therein, and M., one of the defendants therein, should pay the same to the plaintiff.

3. That pursuant to said decree or judgment, the premises were duly sold on [insert date] by the sheriff of county, in this state,

for the price or sum of \$ [and that the plaintiff became the purchaser thereof].

4. That upon said sale there occurred a deficiency of \$, as appears by the sheriff's [or commissioner's] report of said sale, duly filed in the office of the clerk of said court, and that thereupon, to wit, on the . day of , 19 , a judgment was rendered in said court against M. in favor of the plaintiff, for the said sum of \$, with interest from , 19 .

5. That before the commencement of this action, he demanded of the defendants payment of the amount of such deficiency, and at the same time tendered to them an assignment of said judgment against M., duly executed by the plaintiff, but that the defendants refused to pay the same, and have ever since neglected and refused to pay the same, or any part thereof, although the plaintiff has always been, and still is, ready and willing to deliver to said defendants an assignment of said judgment upon being paid the amount due thereon.

[Concluding part.]

FORM No. 802—By surety against principal, for indemnity.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the . day of , 19 , at , the defendant, in consideration that the plaintiff would become surety for him, by executing an undertaking, a copy of which is hereto annexed, marked "Exhibit A," and made a part of this complaint [or petition], promised and agreed with the plaintiff that he would indemnify him, and save him harmless from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

2. That the plaintiff, confiding in such promise of the defendant, executed and delivered such undertaking, but the defendant did not indemnify the plaintiff and save him harmless from such damages, costs, and charges; that, on the contrary, the plaintiff, under a judgment, on the . day of , 19 , duly given and made against him by the . court, at , in an action brought against him upon said undertaking, paid, on the . day of , 19 , \$ to , in satisfaction and discharge of said undertaking, and also necessary costs and expenses in said action and on account of said undertaking, to the amount of \$.

3. That the defendant had due notice thereof, and that the plaintiff duly performed all the conditions of the said agreement on his part to be performed.

4. [Same as paragraph 5, form No. 796.]
[Concluding part.]

FORM No. 803—Against surety, for payment of rent.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on or about the day of , 19 , at , one L. M., by agreement, in writing, with this plaintiff, hired of the plaintiff for the term of years the [designate the premises], at the annual rent of \$, payable quarterly.

2. That [at the time and place above mentioned] the defendant, in consideration of the letting of the said premises to the said L. M., subscribed and delivered to the plaintiff an agreement in writing, of which the following is a copy: [Set out copy], whereby he guaranteed the payment of the said rent.

3. That the rent aforesaid for the quarter ending on the day of , 19 , amounting to \$, has not been paid.

4. That on the day of , 19 , the plaintiff gave notice to the defendant of the non-payment of said rent, and demanded payment thereof.

5. That said sum has not been paid, nor any part thereof, and that the same is now due and payable from the defendant to the plaintiff.

[Concluding part.]

FORM No. 804—Upon original obligation of a promisor, to repay moneys advanced to another upon the order of the promisor, the order itself being lost.

(In *People's Bank v. Stewart*, 136 Mo. App. 24; 117 S. W. 99.)¹

For a cause of action against the defendant, the plaintiff alleges:

1. That at all the dates and times mentioned in this petition plaintiff was, and it now is, a banking corporation organized under

¹ Actions in the nature of that set forth in form No. 804 are deemed, under the code, not to be upon guaranty required to be in writing, inasmuch as the credit in such case is extended to the original promisor, irrespective of who may derive the immediate benefits from the moneys advanced thereon. Such an action is not governed by the law relating to suretyship or guaranty: *People's Bank v. Stewart*, 136 Mo. App. 24, 117 S. W. 99, 101.

the laws of the state of Missouri, and during all of said times was, and it now is, engaged in the banking business at Aurora, Missouri, and that at all said times Roley & Co. was, and it now is, a copartnership engaged in running and operating a zinc mine at Aurora, Missouri.

2. That on January 6, 1906, the defendant herein, Peter W. Stewart, by his written order of that date, duly executed by him and delivered to the plaintiff, which said order is lost, and can not be filed herewith for that reason, ordered and requested the plaintiff to advance to the said partnership of Roley & Co. such sum as was needed to meet the paper of the said partnership down to and including that date.

3. That on the said last-mentioned date the plaintiff accepted the said order of the defendant, and advanced to the said Roley & Co., on the said order and request of said defendant, the sum then due by the said partnership on account of its paper, which plaintiff alleges was the sum of \$300; and plaintiff further states that it then paid said sum upon said order of the defendant on account of the said paper of the said partnership of the said Roley & Co.

4. Plaintiff further states that the defendant herein, Peter W. Stewart, had notice of the acceptance by the said plaintiff of the written order aforesaid, and of the fact that the plaintiff had paid the sum aforesaid on account of the paper of the said partnership as aforesaid.

5. Plaintiff further states that no part of the said sum so paid by it on the order in writing aforesaid, signed and delivered to it as aforesaid by the defendant, has been paid to it by the said defendant or by the said partnership, but the whole thereof remains due and unpaid, although the same has been demanded of the defendant and from the said partnership.

Wherefore, the plaintiff demands judgment against the defendant for the said sum of \$300, with interest thereon from January 6, 1906, at the rate of six per cent per annum [etc.].

McPherson & Hilpert,
Attorneys for plaintiff.

For the California statute enumerating the various classes of promises to answer for the obligation of another deemed original obligations of the promisor, and therefore not required to be in writing, see Civ. Code, § 2794.

Form No. 804 may be used in an action where the order upon which moneys directed to be paid is not lost, by omitting the allegation therein to that effect, resting upon the averments as to the making of the order, its acceptance, etc.

FORM No. 805—Against guarantors of a promissory note.

(In *Merchants' Trust Co. v. Bentel*, 10 Cal. App. 75; 101 Pac. 31.)

[Title of court and cause.]

The plaintiff complains of the defendants, and for cause of action alleges:

1. That the plaintiff is, and for more than one year last past has been, a banking corporation duly created, organized, and existing under the laws of the state of California, and having its principal place of business at the city of Los Angeles, in said state.

2. That on the 10th day of April, 1907, plaintiff, at the said city of Los Angeles, state of California, loaned to The Hecla Consolidated Mines Company, a corporation, and said The Hecla Consolidated Mines Company borrowed and received of the plaintiff, the sum of \$3,000, in gold coin of the United States of America, which said sum the said Hecla Consolidated Mines Company agreed to repay to the plaintiff herein, at its banking-house in the said city of Los Angeles, on the 10th day of October, 1907, with interest thereon from April 10, 1907, until paid, at the rate of seven per cent per annum, payable monthly, and if not so paid the interest should become a part of the principal, and thereafter bear like interest as the principal; and it was also agreed that in case suit be brought to compel payment of said note it would pay an additional sum of ten per cent on the unpaid principal and interest as attorney's fees, and would also pay costs of suit, and that the principal and interest should be paid in gold coin of the United States; that to evidence said loan and the terms thereof, and for the aforesaid consideration and loan, the said Hecla Consolidated Mines Company thereupon, and on the said 10th day of April, 1907, made, executed, and delivered to the plaintiff herein its certain promissory note, in words and figures following, to wit: "Los Angeles, Cal., April 10, 1907. No. 1382. Six months after date, for value received, we promise to pay to the Merchants' Trust Company, or order, at its banking-house in Los Angeles, three thousand dollars (\$3,000) with interest from date until paid, at the rate of seven (7) per cent per annum, payable monthly, and if not so paid the interest shall become a part of the principal and thereafter bear like interest as the principal. In case suit be brought to compel payment of this note, we agree to pay an additional sum of ten per cent on the unpaid principal and interest as attorneys' fees and costs of suit. Principal and interest payable in gold coin of the

United States. The Hecla Consolidated Mines Company. Edwin M. Hills, Pres. Wm. S. Vawter, Secy. [Corporation seal.]”

3. That at the time of the making, execution, and delivery of the aforesaid promissory note, to wit, the said 10th day of April, 1907, and as a part of the same transaction, and as the consideration and inducement upon which and for which the plaintiff herein made the said loan, and in consideration of said loan so made, the defendants, together with other persons, to wit, John R. Bragdon, William S. Vawter, T. H. Dudley, C. C. Bragdon, and Edwin M. Hills, made, subscribed, and caused to be endorsed and delivered upon the back of the said promissory note their written instrument of guaranty in words as follows: “We hereby jointly and severally guarantee payment of the within note, or any renewal or extension thereof, and all expenses of collection thereof, and waive demand, presentment for payment, protest, and notice of protest, and consent that the time for payment may be extended without notice to [here follow signatures of all said persons including the guarantors].”

4. That prior to the commencement of this action there had been paid upon the principal sum of said promissory note the sum of \$1,500, and all interest accrued thereon to November 10, 1907; and that there now remains due, owing, payable, and unpaid upon said promissory note a balance of the principal sum of \$1,500, together with interest upon said balance from November 10, 1907, at the rate of seven per cent per annum, payable monthly.

5. That prior to the commencement of this action plaintiff demanded payment of said The Hecla Consolidated Mines Company of the balance due and unpaid on said promissory note, and that said The Hecla Consolidated Mines Company has not paid said balance, or any part thereof, or any interest thereon, nor have the above-named defendants, or either or any of them, paid the said balance of principal and interest upon said note, or any part or portion thereof, but the whole of said balance of \$1,500, and interest thereon as in said note provided, from November 10, 1907, remains and is now due, owing, payable, and unpaid to the plaintiff herein.

6. That the sum of \$150 is a reasonable sum to be allowed to the plaintiff herein for the services of its attorney in this action, as in said note provided.

Wherefore, plaintiff prays judgment against said defendants for the sum of \$1,500, and interest thereon from November 10, 1907, until

entry of judgment, all in gold coin of the United States of America, and for the further sum of \$150 as its attorneys' fees, and for costs of suit.

[Verification.]

Patton & Sage,
Attorneys for plaintiff.

§ 348. ANSWERS.

FORM No. 806—Defense that guarantor had no notice of non-payment of note until after insolvency of maker.

(In Withers v. Berry, 25 Kan. 373.)

[Title of court and cause, etc.]

The defendant, for answer to plaintiff's petition, denies each and every material allegation therein contained, except such as may be hereinafter admitted.

Defendant, further answering said petition, says that prior to the time when said note in the petition mentioned became due and payable, he sold and delivered the note to plaintiff and signed the same as guarantor; that said note became due and payable on the day of , 19 ; that but one of the original parties to said note was solvent at the time it became due and payable, and that plaintiff well knew that one was the only one of the original makers of the note who was solvent at the time of said sale and transfer by defendant to plaintiff; that plaintiff did not give defendant any notice of the non-payment of said note until in the month of , 19 ; that at that time the said had left the state of , and had become and was insolvent, and all of the original makers of the note were at that time insolvent; that if plaintiff had used due diligence in suing upon said note, or had given notice to defendant of the non-payment of the note prior to the time said left the state and became insolvent, he, the defendant, could have saved himself from loss of the payment of the note mentioned; but that, by reason of said neglect to sue or give notice to defendant before the said left the state and became insolvent, the defendant is unable to save himself from the loss of said sum in the note mentioned.

Defendant, further answering, says that by reason of said want of demand and due notice of defendant, the plaintiff ought not to recover of him, the defendant.

Wherefore, defendant prays that said cause may be dismissed as to him, and that he may recover his costs herein expended.

[Signature, etc.]

FORM No. 807—Defense that sureties signed notes without consideration, and at the instance of the plaintiff only.

(In Barnes v. Van Keuren, 31 Neb. 165; 47 N. W. 848.)

[Title of court and cause.]

Defendants deny every allegation of the petition not herein expressly admitted, and admit the signing of the notes in the petition mentioned; but they aver that they signed said notes as sureties for the defendant , and without any consideration therefor, at the special instance and request of the plaintiff.

That the principal maker of the notes never requested the defendants to sign the same, but that the same was done for the plaintiff's accommodation after the delivery of the notes by the principal maker thereof. [Etc.]

Form of answer in an action on an indemnity contract: Rogers v. Kimball, 121 Cal. 247, 53 Pac. 648.

Forms of petition and reply in an action against defendant as guarantor of a contract of lease entered into between plaintiff and a third person: Walser v. Wear, 141 Mo. 442, 446, 42 S. W. 928.

CHAPTER XCIX.

Chattel Mortgages and Pledges.

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Wherefore, the plaintiff prays judgment: That the defendant be foreclosed of all interest, lien, and equity of redemption in said mortgaged property, to wit, the said goods and chattels; that the same be sold, and that the proceeds thereof be applied to the payment of the costs and expenses of this action, and of counsel fees not to exceed the sum of \$, and of the amount due on said note and mortgage, with interest thereon up to the time of payment, at the rate of per cent per month; that the defendant be adjudged to pay any deficiency that may remain after applying all said money as aforesaid; and for such other and further relief as to this court may seem just in the premises.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 809—To foreclose chattel mortgage for default in making payments of instalments, and praying for appointment of receiver.

(In John Breuner Co. v. King, 9 Cal. App. 271; 98 Pac. 1077.)

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. [Averment of incorporation of plaintiff.]

2. That on the 31st day of August, 1903, the defendant made and executed her certain promissory note, in writing, in the words and figures following: [Here is printed copy of the note providing for monthly instalment payments], whereby she promised to pay to plaintiff the sum of \$18,500, with interest at six per cent per annum, at the times and in the manner therein specified, in gold coin of the United States, and then and there delivered the said promissory note to the plaintiff.

3. That at the time and place aforesaid, in order to secure the payment of the said promissory note, the defendant executed and delivered to the plaintiff her said instrument in writing, known as a chattel mortgage, a copy of which is hereto annexed marked "Exhibit A,"¹ and is hereby made a part hereof, which said chattel

¹ It is provided in the mortgage annexed as an exhibit to this complaint that upon default of the maker of the note in the payment of any instalment provided therein the mortgagee may take possession of the mortgaged property, "and may immediately proceed to foreclose this mortgage by action, and obtain a decree for the sale of the said mortgaged property and the application of the proceeds to pay the whole amount of principal and interest specified in said promissory note," etc.

mortgage was made and given in good faith for the purpose aforesaid, without intent to defraud creditors or purchasers, and was verified, acknowledged, and recorded pursuant to the statute in such cases made and provided.

4. That the property mentioned and described in said chattel mortgage consisted and consists of all the furniture, upholstery, carpets, draperies, chinaware, and other household goods of every kind, located and contained in and about that certain building in said city and county of San Francisco known as the Haddon Hall Apartment House, and also known as No. 951 Eddy Street, said building being situated upon the lot on the south side of Eddy Street, 68 feet 9 inches front by 120 feet deep, and commencing 137½ feet easterly from southeast corner of Gough and Eddy streets.²

5. That default has been made by defendant in the payment of the three several instalments, or sums of \$200 each, which became due and payable on the 1st day of January, 1904, the 1st day of February, 1904, and the 1st day of March, 1904, respectively, with the interest thereon, and the sum of \$17,900 is now wholly due and unpaid by the defendant to the plaintiff, with interest thereon at the rate of six per cent per annum from August 31, 1903.

6. That no proceedings have been had at law or otherwise for the recovery of said sum of \$17,900 and interest, or any part thereof.

Wherefore, the plaintiff prays judgment:

(a) That the defendant be foreclosed of all interest, lien, and equity of redemption of said mortgaged property, to wit, the said goods and chattels.

(b) That the same may be sold by a commissioner, to be appointed by the court, and that the proceeds thereof be applied to the payment of the costs and expenses of this action, and of counsel fees, to be fixed by the court, and of said sale, and of the amount due on said promissory note and mortgage, with interest thereon at the rate aforesaid up to the time of payment.

² The description in this complaint of the property under mortgage is sufficient, and it was not error to overrule a demurrer to the complaint upon the ground that the complaint was uncertain in respect to such description. The rule as to the description of personal property in chattel mortgages is thus stated: "As against third parties, the mortgage must point out the subject-matter so that the third person may identify the property covered by the aid of such inquiries as the instrument itself suggests. But, between the parties, it is only necessary to identify the chattels so that the mortgagee may see with a reasonable degree of certainty what property is subject to his lien": *John Breuner Co. v. King*, 9 Cal. App. 271, 98 Pac. 1077, 1078, quoting rule as stated in 6 Cyc., p. 1022.

(c) For the appointment of a receiver.

(d) And that the defendant be adjudged to pay any deficiency that may remain after applying the proceeds of sale as aforesaid.

(e) And for such other and further relief as to the court may seem just in the premises.

[Verification.]

Rigby & Rigby,
Attorneys for plaintiff.

FORM No. 810—For foreclosure of pledge.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , in consideration of the loan of \$ of that date by the plaintiff to the defendant, to be repaid on the day of , 19 , the defendant, as a pledge to secure the repayment of the same, delivered to the plaintiff the following property: [Describing it]; and the same is in the possession of the plaintiff.

2. That the said debt has become due, but the defendant has not paid the same nor any part thereof, and defendant is indebted to the plaintiff thereon in the sum of \$.

Wherefore, the plaintiff prays judgment that said property may be ordered to be sold, and the proceeds thereof applied to the payment of said indebtedness, and execution awarded for the balance.

[Verification.]

A. B., Attorney for plaintiff.

FORM No. 811—To recover for loss of pledge.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff delivered to the defendant [designate thing delivered], the property of the plaintiff, of the value of \$, by way of pledge, and as security for the loan of \$, then and there loaned by the defendant to the plaintiff, and in consideration of interest thereon to be paid; that said loan was to be repaid within days, in default of which said [goods] were to be sold by the defendant.

2. That the defendant negligently failed to take due and proper care of said [goods], whereby the same were lost [or the defendant

wrongfully sold said goods before the said day for the repayment of said loan].

3. That on the day of , 19 , the plaintiff tendered to defendant the said amount so borrowed, with interest thereon, to wit, \$, and demanded a redelivery of said [goods], which was refused, and said [goods] have not been returned to the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 812—To recover for injury to pledge.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [As in preceding form.]

2. That the defendant negligently failed to take due and proper care of said [pledge], whereby the same was greatly damaged [state the injury], and was rendered of small value to the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 813—By pledgeor of note as collateral, against pledges.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff was indebted to the defendant in the sum of \$, and delivered to the defendant, as collateral security for the payment of the same, a promissory note made by one L. M. for \$, bearing date on the day of , 19 , and payable at months after its date.

2. That at its maturity the said note was collected by the defendant, and by the application of the moneys so received by him said indebtedness was wholly paid and extinguished.

3. That after payment of said indebtedness there remained in the hands of the defendant a balance of \$ belonging to this plaintiff, payment of which the plaintiff demanded of the defendant on the day of , 19 , but defendant has not paid the same, or any part thereof.

[Concluding part.]

FORM No. 814—For an accounting concerning pledged goods, and for an injunction restraining the sale of goods where the amount due is in dispute.

(In *Castoriano v. Dupe*, 145 N. Y. 250; 39 N. E. 1065.)

[Title of court and cause.]

That on the day of , 19 , plaintiff executed a bill of sale absolute on its face of certain embroideries and delivered it to defendant as collateral security for a debt owing to him; that the amount of the debt was by agreement to have been determined at the date of the transfer, but was left, and still remains, undetermined; that the defendant claims to hold the goods as absolute owner, and asserts a liability on the part of plaintiff for sums not in truth due and owing; that an accounting is needed to ascertain the true amount of the debt which plaintiff must pay in order to redeem his property; that said embroideries are of a peculiar character, whose value can only be reached by private sales to a narrow range of purchasers, and which would be sacrificed by a sale at public auction; that plaintiff has tendered to defendant the sum of \$1,800 to redeem the pledged goods, which the defendant has refused, and has advertised the property for sale; that the plaintiff is ready and willing to pay whatever sum may be adjudged to be due from him in order to redeem the pledged goods.

Plaintiff prays judgment: That said bill of sale be declared to be collateral to the debt due to the defendant; that an accounting be had to settle the amount of that debt; that upon its payment the defendant be required to restore the goods; and that an injunction issue in the meantime restraining the sale [etc.].

A. B., Attorney for plaintiff.

§ 351. JUDGMENT [OR DECREE].

FORM No. 815—On foreclosure of chattel mortgage and order of sale, and appointing commissioner.

(In *John Breuner Co. v. King*, 9 Cal. App. 271; 98 Pac. 1077.)

[Title of court and cause.]

[After recitals as to appearance of parties, hearing, submission and filing of findings, and enumeration of certain of the findings showing plaintiff's right:]

Now, therefore, it is hereby ordered, adjudged, and decreed, that William J. Ferguson, of the city and county of San Francisco, furni-

ture-salesman, be and he is hereby appointed a commissioner to sell the encumbered property; and it is further ordered, that before entering upon his duties as such commissioner he shall take the oath and given an undertaking in the sum of \$1,000, as required by law. The sum of \$10 is hereby fixed as the compensation of such commissioner.

It is adjudged and decreed, that all and singular the mortgaged property mentioned in the said complaint, and hereinafter described, or so much thereof as may be sufficient to raise the amount due to the plaintiff for the principal and interest and costs of this suit, and expenses of sale, be sold by the said commissioner in the manner prescribed by law for the sale of like property by the sheriff upon execution, and according to the course and practice of this court, and the plaintiff may become the purchaser at such sale of any of said property; that the said commissioner, out of the proceeds of said sale, retain his fees, disbursements, and commissions on said sale, and pay to the plaintiff or to its attorneys out of said proceeds the sum of \$8.50 and \$250, costs and counsel fees of this suit; also, pay to the plaintiff the further sum of \$18,616, the amount so found due as aforesaid, together with interest thereon at the rate of six per cent per annum from the date of this decree, or so much thereof as the said proceeds of sale will pay of the same; that the defendant, and all persons claiming or to claim from or under her, and all persons having liens subsequent to said mortgage upon the property described in said mortgage, and their personal representatives, be forever barred and foreclosed of and from all equity of redemption and claim of, in, and to said mortgaged property and every part and parcel thereof.

And it is further adjudged and decreed, that if the moneys arising from the said sale shall be insufficient to pay the amount so found due the plaintiff as above stated, with interest and costs and expenses of sale as aforesaid, the said commissioner shall specify the amount of such deficiency and balance due to plaintiff in his return of said sale; and that on the coming in and filing of said return the clerk of this court docket a judgment for such balance against the defendant, and that the defendant pay to the plaintiff the amount of such deficiency and judgment, with interest thereon at the rate of six per cent per annum from the date of said last-mentioned return and judgment, and that the plaintiff have execution therefor.

The property directed to be sold by this decree is all the furniture, upholstery, carpets, draperies, chinaware, and other household goods of every kind, located and contained, on the 31st day of August, 1903, in and about that certain building in said city and county of San Francisco known as the Haddon Hall Apartment House, and also known as No. 951 Eddy Street, said building being situated on a lot on the south side of said Eddy Street [here particularly described].

Done in open court, this 3d day of October, 1904.

John Hunt,
Judge of Superior Court.

§ 352. ANNOTATIONS.—Liens and pledges.

1. Action by assignee of lien.
2. Assignee of debt.—Right of, to foreclose lien.
3. Action by pledgeor in nature of specific performance.
4. Plea of tender.
5. Continuance of lien.
6. When lien is lost.

1. Action by assignee of lien.—An assignee of a lien may maintain an action to enforce the same: *Duncan v. Hawn*, 104 Cal. 10, 12, 37 Pac. 626; *McCrea v. Johnson*, 104 Cal. 224, 225, 37 Pac. 902; *Clark v. Brown*, 141 Cal. 93, 95, 74 Pac. 548. See *Falconio v. Larsen*, 31 Ore. 137, 147, 48 Pac. 703, 37 L. R. A. 254.

2. Assignee of debt.—Right of, to foreclose lien.—The assignee of a chose in action may maintain an action thereon, and where the right assigned carries a lien may foreclose the latter: *Duncan v. Hawn*, 104 Cal. 10, 12, 37 Pac. 626, distinguishing *Mills v. La Verne L. Co.*, 97 Cal. 254, 32 Pac. 169, 33 Am. St. Rep. 168; *McCrea v. Johnson*, 104 Cal. 224, 225, 37 Pac. 902. See *Tuttle v. Howe*, 14 Minn. 145, 150, 100 Am. Dec. 205; *Rogers v. Omaha Hotel Co.*, 4 Neb. 54, 57; *Skyrme v. Occidental M. etc. Co.*, 8 Nev. 219; *Falconio v. Larsen*, 31 Ore. 137, 147, 48 Pac. 703, 37 L. R. A. 254; *Iage v. Bossieux*, 15 Grat. (Va.) 83, 76 Am. Dec. 189; *Davis v. Bilsland*, 35 U. S. (13 Wall.) 659, 21 L. ed. 969.

3. Action by pledgeor in nature of specific performance.—A pledgeor of stock may maintain action in the nature of specific performance to compel pledgee to return stock when it is of uncertain value and has no known or

fixed market value: *Krouse v. Woodward*, 110 Cal. 638, 643, 42 Pac. 1084.

4. Plea of tender of money due on a pledge is sufficient without bringing the money into court: *Loughborough v. McNevin*, 74 Cal. 250, 255, 14 Pac. 369, 15 Pac. 773, 5 Am. St. Rep. 435. See *Kortright v. Cady*, 21 N. Y. 343, 354, 366, 78 Am. Dec. 145.

5. Continuance of lien.—A lien is not extinguished so long as the indebtedness is kept alive, or so long as an action can be brought to recover the debt: *Henderson v. Grammar*, 66 Cal. 332, 336, 5 Pac. 488; *London etc. Bank v. Bandmann*, 120 Cal. 220, 222, 52 Pac. 583, 65 Am. St. Rep. 179; *Mutual L. Ins. Co. v. Pacific F. Co.*, 142 Cal. 477, 76 Pac. 67, 70. See *London etc. Bank v. Dexter H. & Co.*, 126 Fed. 593, 603, 61 C. C. A. 515.

6. When lien is lost.—A lien is absolutely lost where, on having such lien, a party is sued in replevin and answers claiming absolute ownership: *Williams v. Ashe*, 111 Cal. 180, 185, 43 Pac. 595. See *Mexal v. Dearborn*, 78 Mass. (12 Gray) 336; *Ballard v. Burgett*, 40 N. Y. 314; *Maynard v. Anderson*, 54 N. Y. 642; *Tuthill v. Skidmore*, 124 N. Y. 148, 155, 26 N. E. 348; *Everett v. Saltus*, 15 Wend. 474.

CHAPTER C.

Bonds and Undertakings, and Actions Thereon.

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§ 353. FORMS OF BONDS, ENDORSEMENTS, ETC.

FORM No. 816—Official bond. (Common form.)

Know all men by these presents, that we, as principal, and
 and , as sureties, are held and firmly bound unto the
 state of , in the following penal sums, to wit, the said princi-
 pal in the sum of \$, and the said , surety, in the penal

[Followed by oath of sureties as in form No. 1028.]

FORM No. 817—Official bond of city clerk.

(In *Lowe v. City of Guthrie*, 4 Okla. 287; 44 Pac. 198.)

Territory of Oklahoma, } ss.
County of Logan. }

Know all men by these presents, that E. G. Millikan, as principal, and John F. Stone, Lowe & Huston, and O. R. Fegan, as sureties, are held and firmly bound unto the city of Guthrie and territory of Oklahoma in the sum of \$1,000, for the payment of which we bind ourselves, our heirs, executors, and administrators.

The condition of the above obligation is that whereas the above-named E. G. Millikan has been elected city clerk in and for the city of Guthrie: Now, if the said E. G. Millikan shall render a true account of his office and of his duties therein to the proper authority, when required thereby or by law, and shall promptly pay over to the person or officer entitled thereto all moneys which may come into his hands by virtue of his said office, and faithfully account for all the

balances of money remaining in his hands at the termination of his office, and shall hereafter exercise all reasonable diligence and care in the preservation and lawful disposal of all money, books, papers, and securities, or other property, appertaining to his said office, and deliver them to his successor, or to any person authorized to receive the same, and if he shall faithfully and impartially, without fear, favor, fraud, or oppression, discharge all the other duties now or hereafter required of his office by law, then this bond to be void; otherwise, in full force.

Signed this 16th day of April, 1892.

| | |
|-------------------|------------|
| E. G. Millikan. | [Seal.] |
| John F. Stone. | [Seal.] |
| Lowe & Huston [by |]. [Seal.] |
| O. R. Fegan. | [Seal.] |

FORM No. 818—Approval of bond, endorsed thereon.

I approve the form and sufficiency of the within bond.

Witness my hand, this day of , 19 .

[Endorsement of filing and record.]

S. T., Judge.

FORM No. 819—Oath of officer on qualifying.

[Title of court and cause.]

State of , }
County of . } ss.

I do solemnly swear that I will support the constitution of the United States and the constitution of the state of , and that I will faithfully discharge the duties of according to the best of my ability. So help me God.

[Signature.]

[Jurat of clerk or notary.]

[Seal.]

FORM No. 820—Exception to sureties on [bail] bond.

[Title of court and cause.]

To the sheriff of County:

You will take notice, that the plaintiff in the action excepts to the sufficiency of the sureties on the [bail] bond given by the defendant in this action, and does not accept said bond.

[Date.]

A. B., Attorney for plaintiff.

FORM No. 821—Notice of justification of sureties on [bail] bond.

[Title of court and cause.]

You will take notice, that the sureties on the undertaking of [bail] of , the defendant in this action, or , residence , occupation , and , residence , occupation , as sureties on the undertaking of [bail] herein, will justify as such sureties on the day of before the Hon. , judge of said court, [or before , Esq., county clerk of said county of ,] at , and at o'clock M., of that day.

[Date.]

M. N., Sheriff.

[or , defendant.]

To A. B., Attorney for plaintiff.

§ 354. FORMS OF PROCEDURE WHERE LEAVE TO SUE AN OFFICER OF THE COURT MUST FIRST BE OBTAINED.

FORM No. 822—Petition for permission to bring an action upon the bond of an executor [or administrator].¹

[Title of court and cause.]

To the Hon. , judge of said court:

The petition of , of , respectfully shows to the court that he is a creditor [or legatee, or next of kin] of , deceased, whose estate is now in course of administration in said court; that , the executor [or administrator] of said estate, was by an order duly given and made by this court on the day of , 19 , ordered and directed to pay the debts and legacies of said deceased [or the distributive shares of said estate which the next of kin of said deceased are entitled by law to receive], and among said debts [or legacies, or distributive shares] the said executor [or administrator] was ordered and adjudged to pay to your petitioner the sum of \$.

That on the day of , 19 , your petitioner demanded of said executor [or administrator] payment of his said claim [or legacy, or distributive share of such estate], but said executor [or administrator] has refused, and still refuses, to pay the same or any part thereof, although he has moneys and effects of said estate in his

¹ In North Dakota, leave of court must be obtained before bringing suit on an executor's bond: N. Dak. Rev. Codes, § 6468. In Nebraska, before action can be brought for maladministration on a probate bond, leave of court must be obtained: Cobbe's Ann. Stats. of Neb., § 5163.

hands sufficient to pay the same. [Or state any other cause of action existing and upon which permission is desired to sue.]

Wherefore, your petitioner prays that he be permitted to bring an action upon the bond of the said executor [or administrator] against him and his sureties thereon.

[Petitioner.]

[Verification.]

By A. B., Attorney for petitioner.

FORM No. 823—Order granting leave to sue on the bond of an executor [or administrator].

[Title of court and cause.]

Upon reading and filing the petition of _____, praying for permission to bring action in his own behalf upon the bond of _____, executor of the last will and testament [or administrator of the estate] of _____, deceased, and it appearing from said petition that good grounds exist for the commencement of such action:

It is ordered, that permission be and the same is hereby granted to said _____ to bring an action on said bond against the said executor [or administrator] and the sureties upon such bond, in the name of the said petitioner as plaintiff, according to the prayer of said petition.

[Date.]

By the court:

S. T., Judge.

For petition for leave to sue a receiver, orders, etc., see chapter CXXV.

§ 355. COMPLAINTS [OR PETITIONS].

FORM No. 824—On bond for the unconditional payment of money. (Common form.)

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That on the _____ day of _____, 19____, at _____, the defendant covenanted in writing with the plaintiff to pay to the plaintiff the sum of \$ _____.

2. That said sum has not been paid, nor any part thereof; that the whole thereof remains due and payable from the defendant to the plaintiff.

[Concluding part.]

FORM No. 825—By surviving obligee on joint bond.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant covenanted with the plaintiff and one C. D., under his hand and seal, to pay them the sum of \$, on the day of , 19 .

2. That on the day of , 19 , at , the said C. D. died.

3. [Same as paragraph 2, in preceding form.]

[Concluding part.]

FORM No. 826—On bond other than for payment of money.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant executed to the plaintiff his bond or writing obligatory, sealed with his seal, a copy of which is here set forth, to wit: [Set out copy.]

2. [State the breach.]

3. [Same as paragraph 2, form No. 824.]

[Concluding part.]

FORM No. 827—On bond for the fidelity of an employee.

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. [Aver incorporation of defendant, if a surety company or other corporation.]

2. That on the day of , 19 , plaintiff was about to employ a clerk, and thereafter, and on the same day, the defendant, as a material consideration for the employment by plaintiff of as such clerk, made and delivered to plaintiff its bond, which bond is in the words and figures following, to wit: [Here insert copy, or annex and refer to the same as an exhibit.]

3. That in consideration of the making and delivery of said bond, plaintiff on the day of , 19 , employed as such clerk in said bond mentioned, and he thereupon entered into the employment of plaintiff as such clerk.

3. That while said was so in the employment of plaintiff as such clerk between the day of , 19 , and the day

of , 19 , he, said , converted \$ in money and certain goods and merchandise, to wit, [here describe], of the value of \$, to his own use, and against the will and without the consent of the plaintiff.

4. That said never accounted to plaintiff for said goods and property, nor any part thereof, nor delivered to plaintiff said property so converted by him to his own use, nor any part thereof, to plaintiff's damage in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for the sum of \$, and plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 828—Against surety company on appeal bond.

(Adapted from *Nolan v. Fidelity and Deposit Co. of Maryland*, 2 Cal. App. 1; 82 Pac. 1119.)

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That the defendant is a foreign corporation organized and existing under and by virtue of the laws of the state of Maryland, for the purpose of acting as surety on bonds and undertakings required in regular proceedings, and during all the times herein mentioned has been, and it now is, conducting said business in the city and county of San Francisco.

2. That on the 10th day of March, 1902, judgment was duly given, made, and rendered by the justice court of the city and county of San Francisco, state of California, in favor of the above-named plaintiff and against the Pacific Debenture Company, a corporation, for the sum of \$299, and \$7 costs of suit, with interest thereon at the rate of seven per cent per annum from the date thereof.

3. That on or about the 4th day of June, 1902, the said Pacific Debenture Company, a corporation, appealed to the superior court of the city and county of San Francisco, state of California, from said judgment.

4. That upon said appeal the said defendant made and filed with the clerk of said justice's court, for the use of this plaintiff, its written undertaking, whereby it undertook, promised, and acknowledged itself bound to pay to plaintiff the amount of the judgment aforesaid,

and all costs incurred, if the said appeal was dismissed, a copy of which undertaking is attached to this complaint marked "Exhibit A," and made part hereof. [See form No. 829.]

5. That on the 15th day of July, 1902, the said appeal in said action was dismissed by the aforesaid superior court, by an order duly given and made therein.

6. That since the rendition of said judgment the plaintiff has incurred additional costs in said action, in the sum of \$5.90.

7. That said judgment has not, nor has any part thereof, ever been paid, although demand therefor has been heretofore made by plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$306, with interest thereon at the rate of seven per cent per annum from the 10th day of March, 1902, and for the further sum of \$5.90, increased costs as aforesaid, and for his costs and disbursements herein.

Louis S. Reedy, and

John T. Pidwell,

[Verification.]

Attorneys for plaintiff.

**FORM No. 829—Undertaking entered into by surety company on appeal from justice court from judgment directing payment of money.
(Exhibit A to complaint, form No. 828.)**

(In *Nolan v. Fidelity etc. Co.*, 2 Cal. App. 1; 82 Pac. 1119.)

[Title of court and cause.]

Whereas, in an action of the justice court of the city and county of San Francisco, state of California, judgment was, on the 10th day of March, 1902, rendered by John R. Daniels, Esq., one of the justices of said court, in favor of the plaintiff, against the Pacific Debenture Company, defendant, for the sum of \$299, and \$7 costs;

And whereas, the said Pacific Debenture Company is dissatisfied with said judgment, and desirous of appealing therefrom to the superior court of the city and county of San Francisco, state of California; now, therefore, in consideration of the premises, and of such appeal, the undersigned, the Fidelity and Deposit Company of Maryland, a corporation, of the city and county of San Francisco, does hereby undertake in the sum of \$100, and promise on the part of the appellant, that the said appellant will pay all costs which may be awarded against it on said appeal, or on a dismissal thereof, not exceeding the aforesaid sum of \$100, to which it acknowledges itself bound;

And whereas, the said appellant claims a stay of proceedings, and it is desirous of staying the execution of said judgment so appealed from, the undersigned, the Fidelity and Deposit Company of Maryland, does further, in consideration thereof, and of such stay of proceedings, and of the premises, undertake and promise and does acknowledge itself further bound in the further sum of \$612, being twice the amount of said judgment including costs, that said appellant will pay the amount of the judgment so appealed from, and all costs, if the appeal be withdrawn or dis-

missed, or the amount of any judgment and all costs that may be recovered against it in the action of said superior court.

Dated, San Francisco, the 8th day of April, 1902.

Fidelity and Deposit Company of Maryland. [Seal.]

By Oscar T. Barber, [Seal.]

Its attorney-in-fact.

Attest: Frank L. Gilbert, Agent. [Seal.]

FORM No. 830—Upon appeal bond given in forcible entry and detainer proceedings.

(In *Hinckley v. Casey*, 54 Wash. 34; 102 Pac. 1051.)

[Title of court and cause.]

The plaintiff complains of the defendants, and for cause of action alleges:

1. That on or about the 1st day of June, 1906, said T. D. Hinckley, deceased, and wife, commenced an action in the above-entitled court against said J. T. Casey and T. J. Casey, to recover possession of certain office rooms, to wit, rooms 412 and 413 in the Hinckley Block, in the city of Seattle, and that a trial was had in said action, and a verdict rendered by a jury on October 31, 1906; that thereafter judgment was duly entered on November 17, 1906, upon said verdict, and that defendants J. T. Casey and T. J. Casey appealed from said judgment, and, as a stay-bond pending said appeal, said J. T. Casey and T. J. Casey, as principals, and P. H. Casey and A. P. Casey, as sureties, made, executed, and filed a bond conditioned that they would pay all costs, damages, and rents which said supreme court or said superior court should adjudge reasonable for the possession of said rooms during the determination of said appeal; that a copy of said bond is hereto attached and made a part hereof, marked "Exhibit A"; that pending said appeal said defendants J. T. Casey and T. J. Casey continued in the actual possession of said rooms until March 15, 1907; that the actual rental value of said rooms from October 31, 1906, to March 15, 1907, was at the rate of \$50 per month, being in all the sum of \$275; that demand was made upon said defendants to pay the aforesaid sum, but that payment has been refused.

Wherefore, plaintiffs demand judgment against said defendants and each of them in the sum of \$275, and for costs and disbursements herein, and that said judgment so recovered be doubled in

accordance with the statute in such cases made and provided, and as may be proper herein.

Fred H. Peterson, and
Philip D. MacBride,
Attorneys for plaintiff.

[Verification.]

[Copy of bond annexed.]

FORM No. 831—On bond given in replevin.

(In Shoning v. Coburn, 36 Neb. 76; 54 N. W. 84.)

[Title of court and cause.]

The plaintiff complains of the defendant, for that on the day of August, 1888, Charles W. Mount commenced an action of replevin in the court of Justice Anderson, a justice of the peace of Omaha, in and for Douglas County, Nebraska, against the plaintiff, as sheriff, and took from plaintiff, on a writ of replevin, certain specific personal property which the plaintiff had levied upon by virtue of an execution issued to him as sheriff, out of the county court of Douglas County, Nebraska, against said Charles W. Mount.

2. On the trial of said cause in said justice court, on the day of August, 1888, the justice found that the right of property and the right of possession were in this plaintiff, and that the value of said property was \$200, and judgment was rendered against said Charles W. Mount that this plaintiff have a return of said property, or the value thereof.

3. The said Charles W. Mount did not return said property, but appealed said case to the district court of Douglas County, and did make [and file] an undertaking to this plaintiff in the sum of \$420 on the 18th day of August, 1888, of which the following is a copy:

[Bond in replevin.]

State of Nebraska, }
Douglas County. } ss.

The state of Nebraska, in the Justice Court.

Charles W. Mount,

v.

William Coburn, Sheriff. }

Before G. Anderson, a justice of the peace for the fourth precinct of Douglas County, Nebraska.

Whereas, on the 18th day of August, 1888, William Coburn, sheriff, recovered a judgment against Charles W. Mount, before Gustave Anderson, a justice of the peace, for the sum of \$200, and costs of suit, taxed at \$, and the said defendant intends to appeal said cause to the district court of Douglas County:

Now, therefore, I, John P. Shoning, do promise and undertake to the said William P. Coburn, sheriff, in the sum of \$420, that the said Charles W. Mount shall prose-

cute his appeal to effect, and without unnecessary delay; and that said appellant, if judgment be adjudged against him on the appeal, will satisfy such judgment and costs.

John P. Shoning. [Seal.]

Executed in my presence, and surety approved by me, this 18th day of August, 1888.

Gustave Anderson,
Justice of the Peace.

A transcript from said justice court was filed in the district court of Douglas County on or about August 20, 1888, as will be seen by reference to docket 10, page 6, of the records of said court.

4. On the trial of said cause in said court, on the 27th day of June, 1889, the right of property and the right of possession of said property were found to be in the defendant, William Coburn, sheriff, at the commencement of said action, and that the value of said property was \$200, and the interest on the same was \$10.40; whereupon judgment was entered against the plaintiff, Charles W. Mount, that the defendant have a return of said property, or \$200, the value thereof, with interest, \$10.40.

5. Said Charles W. Mount had not returned nor offered to return said property.¹

6. On the 30th day of December, 1889, an execution was issued to the sheriff of Douglas County on said judgment against Charles W. Mount, and returned wholly unsatisfied on the 8th day of January, 1890. On the 9th day of January, 1890, an alias execution was issued against said Charles W. Mount on said judgment, and returned on the 5th day of February, 1890, wholly unsatisfied.

7. On or about the 12th day of November, 1889, John P. Shoning, defendant, paid \$100 on said judgment.

8. The plaintiff has sustained damages in the premises in the sum of \$142.08.

The plaintiff therefore prays judgment against the defendant for the sum of \$142.08, with interest on \$210.40 from the 13th day of May, 1889, to the 12th day of November, 1889, and on \$110.40 from the 12th day of November, 1889, and costs of this suit.

John T. Cathers,
Attorney for plaintiff.

¹ A return, or offer to return, the property in replevin actions is a matter of defense; it is sufficient on that point to allege in the petition that the property has not been returned: *Shoning v. Coburn*, 36 Neb. 76, 54 N. W. 84.

FORM No. 832—On supersedeas bond.

(In *Walburn v. Chenault*, 43 Kan. 352; 23 Pac. 657.)

[Title of court and cause.]

The plaintiff, for a cause of action against the defendants, A. W. and C. D., alleges:

1. That at the regular term of this court, in 1885, on the 5th day of October, 1885, in a case pending in the district court of County, state of Kansas, wherein E. F. was plaintiff and the St. L. R. Co. was defendant, the said E. F. recovered a judgment against the St. L. R. Co. for the sum of \$ and the costs of suit, amounting to \$.

2. That afterwards the St. L. R. Co. took the case to the supreme court of the state of Kansas upon proceedings in error, and filed a supersedeas bond or undertaking in said district court, as provided by law in such cases, to secure the payment of said judgment, interest, and costs, should the same be affirmed in said proceedings in error in the supreme court, upon which undertaking defendants, A. W. and C. D., were sureties for said railroad company. A copy of such undertaking is hereto annexed, marked "Exhibit A," and made part hereof.

3. That afterwards, for a valuable consideration, the said E. F. assigned and transferred the said judgment and said undertaking to this plaintiff, who is now the legal owner and holder thereof; that in the supreme court such proceedings were had that said judgment was affirmed by said supreme court, and the liability of said defendants thereby accrued upon said undertaking for the payment of said judgment, interest, and costs; that these defendants and the railroad company refused to pay said judgment, interest, and costs, or any part thereof; that of the said judgment the sum of \$ bears interest at the rate of per cent per annum from the date of the rendition thereof, and the sum of \$ at the rate of ten per cent from the date of the rendition thereof.

Wherefore, plaintiff demands judgment against defendants for the sum of \$, with interest thereon from the day of , 19 , and for costs herein.

A. B., Attorney for plaintiff.

§ 356. ANSWER.

FORM No. 833—Defense of failure of consideration.

[Title of court and cause.]

The defendant answers the plaintiff's complaint [or petition], and alleges:

1. That he gave the bond mentioned therein to the said A. B. solely in consideration of the performance by said A. B. of the covenants and conditions upon his part, in an agreement then made between them, of which agreement a copy is annexed hereto, marked "Exhibit A," and made a part of this answer.

2. That this defendant on his part duly performed all the conditions of said agreement.

3. That the plaintiff failed and neglected to perform the conditions of said agreement on his part to be performed, in this: [Here allege the breach as in an action upon the contract.]

[Concluding part.]

Form of complaint in an action on an undertaking given under section 511 of the Kansas Code of Civil Procedure (Gen. Stats., p. 730): *Doyle v. Boyle*, 19 Kan. 168, 169.

Form of answer in an action by a trustee upon a bond for a deed: *McIntosh v. Johnson*, 8 Utah 359, 31 Pac. 450.

Form of complaint by surety on an attachment bond: *Long v. Sullivan*, 21 Colo. 109, 40 Pac. 359.

Form of petition in an action on a bond, brought by plaintiff as the legal representative of a deceased person: *Tittman v. Green*, 108 Mo. 22, 27, 18 S. W. 885.

Form of complaint in an action upon a bond given upon a partnership agreement: *Remington v. Cole*, 62 Cal. 311, 312.

Form of bond in an action in ejectment in which the defendant claims under a guardian's sale, the plaintiff contending that the guardianship proceedings were void: *Larimer v. Wallace*, 36 Neb. 444, 449, 54 N. W. 835, 837.

Form of bond in an action thereon, said bond having been executed in pursuance of the provisions of section 1030 of the Nebraska Code of Civil Procedure: *Morrison v. Boggs*, 44 Neb. 248, 249, 62 N. W. 473.

Form of bond given in probate: *Kelley v. Seay*, 3 Okla. 527, 41 Pac. 615.

Form of supersedeas bond given in forcible entry and detainer proceedings, set forth, and held sufficient, and judgment in an action thereon affirmed: *Hinckley v. Casey*, 54 Wash. 34, 102 Pac. 1051, 1052.

Form of guaranty bond in an action to recover on moneys paid thereon in satisfaction of mechanics' liens: *McMenomy v. White*, 115 Cal. 339, 47 Pac. 109.

For an agreed statement of facts in an action by a municipality upon the official bond of a city clerk, see *Lowe v. City of Guthrie*, 4 Okla. 290, 44 Pac. 198.

§ 357. ANNOTATIONS.—Bonds and undertakings, and actions thereon.

1. Actions.—Essentials of a complaint in an action upon a bond.
2. Filing of bond must be pleaded.
- 3, 4. Complaint in an action upon a bail bond.

5. Demand in action against surety.
6. Sufficient pleading of demand.
7. Non-payment of damages a necessary allegation.
8. Action by assignee of judgment.
9. Defenses.—In general.
10. Laches must be pleaded as a defense.

1. **ACTIONS.**—Essentials of a complaint in an action upon a bond.—The elements of an action on a bond to recover the penalty thereof, and consequently the essential matters to be alleged in the complaint are: 1. The execution and delivery of the contract or obligation to which the bond was incident, and for which it was given to insure execution. 2. The execution and delivery of the bond. 3. Failure of the defendant to perform his contract, or failure of title, or any other state of facts showing default in the defendant in relation to the contract, and from which the plaintiff has suffered detriment. 4. The nature and character of damages to the plaintiff growing out of defendant's failure or fault in connection with the contract, with a special valuation so as to advise the defendant fully of the issues he is expected to meet in regard to damages: Adapted from *Kumblad v. Allen*, 51 Wash. 425, 99 Pac. 19.

2. **Filing of bond must be pleaded.**—A complaint in an action upon a bail bond must, in addition to other matters, contain the necessary averment that the undertaking declared upon was filed by the clerk of the court, or with the proper officer. Until this has been done no judgment of forfeiture can be given or rendered: *Malheur County v. Carter*, 52 Ore. 616, 98 Pac. 489, 491; *Belt v. Spaulding*, 17 Ore. 130, 20 Pac. 827.

3. **Complaint in an action upon a bail bond should show the occasion for the taking of the bond;** the criminal proceeding commenced or pending in which said bond was given; the fact that an examination had been had before an officer qualified by law to hold an examination or to admit to bail; that upon such examination, or otherwise, it was held or adjudged that there was probable cause for believing the defendant guilty of some specified charge; that the defendant was held to answer the charge; that he was admitted to bail thereupon; that bail was given for the release of the defendant; that the undertaking was

filed with the clerk of the court; that the defendant did not appear thereafter to answer to the charge, but made default, and that the undertaking was thereupon declared forfeited by the court; that demand on the defendants for payment was made, and that they failed to respond thereto: *Malheur County v. Carter*, 52 Ore. 616, 98 Pac. 489, 491.

4. **To constitute a good cause of action on an undertaking for bail, it is necessary to allege that defendant was charged with a crime, that an examination was had, and that he was held to answer the charge:** *Malheur County v. Carter*, 52 Ore. 616, 98 Pac. 489, 491; *State v. Logoni*, 30 Mont. 472, 76 Pac. 1044.

5. **Demand in action against surety.**—Demand is necessary before suit where the action is against a surety: *Mullally v. Townsend*, 119 Cal. 47, 51, 50 Pac. 1066; *Pierce v. Whiting*, 63 Cal. 538, 542, (against sureties on attachment bonds).

6. **Sufficient pleading of demand.**—Where the complaint in an action against sureties alleged demand as follows: "That they paid the plaintiff the said judgment, and demanded of them the fulfilment of the obligation as expressed in the said undertaking"; held, that this was sufficiently specific and certain to charge the sureties with liability upon their obligation: *Mullally v. Townsend*, 119 Cal. 47, 52, 50 Pac. 1066, (against sureties on attachment bond).

7. **Non-payment of damages a necessary allegation.**—Non-payment of damages alleged to have accrued is a necessary averment in an action upon an attachment bond. Non-payment being a breach, it is of the substance of the action, and therefore must be alleged: *State ex rel. Rife v. Reynolds*, 137 Mo. App. 261, 117 S. W. 653, 654; *Morgan v. Menzies*, 60 Cal. 341; *Church v. Campbell*, 7 Wash. 547, 35 Pac. 381.

8. **Action by assignee of judgment.**—An assignee of a judgment can not recover on an undertaking given to stay

proceedings where he is not also the assignee of the undertaking: *Chilstrom v. Eppinger*, 127 Cal. 326, 78 Am. St. Rep. 46, 59 Pac. 696.

9. DEFENSES.—In general.—An answer to a complaint in an action on a contract to indemnify plaintiff as surety upon a forthcoming bond may be denial of the execution of the bond, or of the recovery of the judgment against the respondent, or the payment thereof, or

an allegation of collusion or fraud. Ordinarily, an answer which does not contain any such defenses raises no issue: *American Bonding Co. v. Dufur*, 49 Wash. 632, 96 Pac. 160, 162.

10. Laches must be pleaded as a defense in an action on a guardian's bond, where it does not appear from the complaint that defendant has been in any way prejudiced thereby: *Cook v. Ceas*, 147 Cal. 614, 82 Pac. 370.

CHAPTER CI.

Subscription Agreements.

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§ 358. COMPLAINTS [OR PETITIONS].

FORM No. 834—On a subscription agreement. (In general.)

[Title of court and cause.]

Plaintiff complains of the defendant, and for cause of action alleges:

1. [If plaintiff is a corporation, so allege.]
2. That the plaintiff, in the month of , 19 , was proposing and contemplating the construction of [here state the nature of the proposed construction or improvement].
3. That the defendant and others were desirous that plaintiff should construct said [here specify], and they requested plaintiff to construct and complete the same; that, for the purpose of enabling the plaintiff to do so, the defendant and others made and executed to plaintiff their agreement and subscription in writing, whereby the defendant, and each of said other subscribers, respectively, promised

to pay to plaintiff the sum of money in said subscription agreement set opposite to their respective names; that in consideration of the premises and of the subscription by said subscribers, defendant promised to [here state the nature of the promise and consideration for said subscription].

That the following is a copy of said subscription agreement, namely: [Here insert copy, or annex and refer to the same as an exhibit.]

4. That upon the consideration of said subscription agreement plaintiff constructed and completed said [or partially constructed, etc.], and expended thereon large sums of money, and incurred large liabilities; that the plaintiff duly performed all of the conditions of said subscription agreement on its part.

5. That after the construction and completion of said , to wit, [or allege the happening of the event or contingency upon which the subscription was to have been paid,] on the day of , 19 , plaintiff demanded from the defendant the said sum of \$, the amount of his said subscription, but the defendant has not paid the same, nor any part thereof, and the whole thereof is due and unpaid from the defendant to the plaintiff.

Wherefore, plaintiff prays judgment against defendant for the sum of \$, and interest thereon from the day of , and plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 835—On subscription agreement for the building of a church.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Allegation of incorporation.]

2. That on the day of , 19 , the plaintiff was erecting a building at , for the purposes of public worship.

3. That the defendant and others requested the plaintiff to complete the same, and for the purpose of enabling the plaintiff to do so, subscribed and agreed to pay to the plaintiff the sum of \$, in consideration of the premises and of a like subscription and agreement of others, by executing and delivering the instrument, of which the following is a copy: [Set out copy, omitting other names.]

4, 5. [As in preceding form.]

[Concluding part.]

§ 359. ANSWERS.**FORM No. 836—Defense of denial of execution of subscription agreement.**

[Title of court and cause.]

[After introductory part:]

Defendant denies that he at the time stated in the complaint herein, or at any time, or at all, subscribed to or executed the alleged subscription agreement set forth in said complaint.

[Etc.]

FORM No. 837—Defense of fraud in obtaining agreement.

[Title of court and cause.]

[After introductory part:]

Defendant admits the execution of said agreement, but alleges that the same was executed through false and fraudulent representations made by the plaintiff to the defendant in respect to the object of said agreement, and the purposes for which said proposed fund therein provided for was to be expended, and that said false and fraudulent representations consisted in statements as follows: [Here state in particular the false and fraudulent representations made]; that defendant believing said representations to be true, signed said agreement; that there was no other consideration for the signing thereof.

[Etc.]

FORM No. 838—Defense of non-performance of conditions upon which the subscription was given.¹

[Title of court and cause.]

[After introductory part:]

Defendant denies that the amount of his subscription in said agreement alleged is due or payable, and in this behalf avers that said subscription was given upon the express understanding and agreement, and upon the condition, that a fund of \$ [or state such other condition as may have been the basis of said agreement] should first be

¹ Where an action is brought to recover from members of a club organized for social purposes their respective amounts subscribed to a building fund, it is necessary to show by the answer in support of the defense "that no demand would be made for the payment of this obligation, or any part thereof, until it can be prudently discharged in the discretion of the board of directors, from the surplus revenue of the club," and that, as a matter of fact, no surplus revenue for said or for any purpose had ever existed: *Rollins v. Denver Club*, 43 Colo. 345, 96 Pac. 133, 18 L. R. A. (N. S.) 733.

pledged or subscribed under said agreement, and by bona fide subscribers thereto, before the defendant should be called upon to pay the amount of said subscription or any part thereof; that said fund of \$ [or state the condition] has never been subscribed or pledged under said or any agreement for the purpose thereof by bona fide subscribers thereto, or otherwise.

[Etc.]

As to action to collect unpaid stock subscriptions, see annotations to ch. XXXVIII, par. 21.

CHAPTER CII.

Charter-Party and Maritime Agreements.

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§ 360. COMPLAINTS [OR PETITIONS].

FORM No. 839—By ship-owner against charterer, for freight.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on or about the day of , 19 , at , the plaintiff and defendant agreed by charter-party, that the plaintiff's ship, called , should with all convenient speed sail to , and that the defendant should there load her with a full cargo of , or other lawful merchandise, to be carried to , and there delivered on payment by the defendant to the plaintiff of freight at \$ per ton, payable as follows: [State terms of payment.]

2. That thereafter the said ship accordingly sailed to aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in said ship to aforesaid, and there delivered the same to the defendant, and otherwise performed all the conditions of said contract on his part.

3. That said freight amounted in the whole to the sum of \$.

4. That said sum has not been paid, nor any part thereof; that the whole thereof remains due and payable from the defendant to the plaintiff.

[Concluding part.]

FORM No. 840—By ship-owner for damages and demurrage for failure to load goods on ship.

[Title of court and cause.]

[After introductory part:]

1. That on the day of , 19 , at , the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship, the , at the port of , on the day of , 19 , tons of [state what], which said ship was to carry to , and there deliver to , on payment of the freight money, to wit, \$; that it was further agreed by said charter-party that defendant should have days for loading, and days for discharge, and days for demurrage, if desired by him, or, if required, at the rate of \$ per day.

2. That at the time fixed by said agreement the plaintiff had said ship at said port, and was ready and willing and offered to receive said merchandise from the defendant, and plaintiff, at the instance of defendant, held said vessel at said port for a period of days.

3. That the period allowed for loading and demurrage under said charter-party has elapsed, but the defendant has not delivered, or offered to deliver, said or any merchandise to said vessel; that thereby, in addition to demurrage, at the rate of \$ per day as aforesaid, for said period of days, no part of which has been paid, plaintiff has been damaged in the sum of \$. [Here damages may be specified.]

4. Wherefore, the plaintiff prays judgment for \$ for demurrage aforesaid, and for \$ additional as damages.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 841—For damages for abandoning voyage.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on or about the day of , 19 , at , the plaintiff and defendant agreed by charter-party that the defendant's

ship, called the , then at , should sail to , or so near there as she could safely get with all convenient speed, and there load a full cargo of , or other lawful merchandise, from the factors of the plaintiff, and carry the same to , and there deliver the same on payment of freight.

2. That the plaintiff duly performed all the conditions of the contract on his part to be performed.

3. That the said ship, the , did not with all convenient speed sail to , or so near thereto as she could safely get; but that the defendant caused the said ship to deviate from her said proposed voyage, and to abandon the same to the damage of the plaintiff in the sum of \$.

[Concluding part.]

CHAPTER CIII.

Breach of Promise of Marriage.

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§ 361. COMPLAINTS [OR PETITIONS].

FORM No. 842—For breach of promise of marriage.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , in consideration of the promise of the plaintiff, being then unmarried, to marry the defendant on request [or at a date certain], the defendant promised to marry the plaintiff within a reasonable time [or on the day of , 19 , as the case may be].
2. That the plaintiff, confiding in said promise, has ever since been [or was on said date] ready and willing to marry the defendant.
3. That although a reasonable time elapsed before this action was commenced [or although she on the day of , 19 , re-

quested him so to do], yet the defendant neglects and refuses to marry the plaintiff, to her damage in the sum of \$.

[Concluding part.]

FORM No. 843—For marriage with another.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1, 2. [As in preceding form.]

3. That the defendant, contrary to his [her] said promise, afterwards married a certain other person, to wit, one C. D.

[Or, That at the time of making said promise, the defendant represented to the plaintiff that he [she] was unmarried, whereas he [she] was then in fact married to another person, of which fact the plaintiff had no knowledge.]

[Etc.]

§ 362. ANSWERS.

FORM No. 844—Denial of promise.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Defendant denies that he [she] ever at any time promised to marry the plaintiff.

[Etc.]

FORM No. 845—Denial of breach.

[Title of court and cause.]

[After introductory part:]

The defendant denies that he at any time refused to marry the plaintiff, but, on the contrary, alleges that on or about the day of , 19 , he offered to marry the plaintiff, and ever since said date has been, and now is, ready and willing to marry the plaintiff.

[Concluding part.]

FORM No. 846—Defense alleging bad character of plaintiff.

[Title of court and cause.]

The defendant answers the plaintiff's complaint [or petition], and alleges:

1. That at the time of making the promise, as therein alleged, the plaintiff was unchaste [or habitually intemperate], but the same was then unknown to the defendant.

2. That as soon as he was informed thereof he refused to marry the plaintiff.
[Etc.]

Form of complaint in an action for breach of promise of marriage: *Lahey v. Knott*, 8 Ore. 198, 199.

A suit for breach of a marriage contract is *ex contractu*, and not *ex delicto*, although it partakes somewhat of the characteristics of the latter: *Broyhill v. Norton*, 175 Mo. 190, 74 S. W. 1024; *Sperry v. Cook*, 138 Mo. App. 296, 120 S. W. 654, 656.

CHAPTER CIV.

Actions on Judgments.

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§ 363. LEAVE TO SUE UPON A JUDGMENT.

Under jurisdictions where leave to sue upon a judgment must first be granted by the court, the forms Nos. 847 to 849 may be used.

FORM No. 847—Notice of motion for leave to sue upon a judgment.

[Title of court and cause, etc.]

To C. D., attorney for defendant:

Take notice, that a motion will be made at [a special] term of this

court, to be held in and for the county of _____, at the county court-house therein, on the _____ day of _____, 19____, at _____ o'clock in the forenoon of said day, or as soon thereafter as counsel can be heard, upon the affidavit hereto annexed, for an order granting leave to the plaintiff to bring an action against the defendant upon the judgment mentioned and described in said affidavit [with costs of this motion], and for such other and further relief as may be proper.

[Date.]

A. B., Attorney for plaintiff.

[Annex affidavit as in form No. 848.]

FORM No. 848—Affidavit accompanying application for leave to sue upon a judgment.

[Title of court and cause, etc.]

County of _____, ss.

_____, of _____, being duly sworn, says: That on the _____ day of _____, 19____, a judgment was rendered in the _____ court of the state of _____, for the sum of \$ _____, and \$ _____ damages, and \$ _____ costs, in favor of this deponent and against _____; that the judgment-roll was thereupon filed in the office of the clerk of said court in the county of _____, on the _____ day of _____, 19____, and said judgment was then and there duly docketed [or a transcript whereof was duly filed and docketed in the _____ clerk's office, on the _____ day of _____, 19____].

That said judgment was rendered upon filing the report of _____, duly appointed in said action as referee, to hear and determine the same [or upon filing the decision of Hon. _____, a justice (or judge) of said _____ court; or upon the verdict of a jury rendered in said action; or upon the default of the said defendant to appear, or answer, therein, upon personal service of the summons in said action upon him; or state other authority for entry of judgment, so as to show that the case is not excepted by statute], and is wholly unpaid [or is unpaid to the amount of \$ _____, with interest (etc.)].

That at or after the time of the rendition of said judgment the defendant was the owner of certain real estate situate in the county of _____, and that the lien of said judgment upon said real estate is about to expire. [Or state other reasons why leave is desired to sue upon the judgment.]

[Where prayer is that an order for service by publication be made, allege further:]

That personal service of notice of motion to sue upon said judgment can not be made upon [defendant] with due diligence, for the following reasons: [State the same.]

[Deponent's signature.]

[Jurat.]

FORM No. 849—Order granting leave to sue upon a judgment.

[Title of court and cause, etc.]

On reading and filing the affidavit of , sworn to , 19 , and [name any other motion papers], with proof of due service of notice of motion upon [etc.], as required by the order of this court, made on the day of , 19 , and on reading and filing [name any opposing papers], and on motion of , of counsel for the plaintiff, and after hearing [etc.; or no one opposing]:

It is hereby ordered, that leave be and the same is hereby granted to the plaintiff to bring an action against the defendant upon the judgment rendered in the above-entitled action in the court, in favor of said , against defendant, on the day of , 19 , for \$ damages, and \$ costs, which said judgment was entered and docketed in the office of the clerk of the court, county of , on said date [or, on the day of , 19].

[Date.] S. T., Judge.

§ 364. COMPLAINTS [OR PETITIONS].

FORM No. 850—On judgment wholly unpaid. (Common form.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , in the court of the county of , in this state, [or, before L. M., a justice of the peace in and for the town of, etc.] a judgment was duly given and made by said court [or justice] in favor of this plaintiff and against the defendant for \$, in an action wherein this plaintiff was plaintiff [or defendant] and said defendant was defendant [or plaintiff].

2. That said judgment has not been paid, nor any part thereof, but that the whole thereof remains due and payable from the defendant to the plaintiff.

[Concluding part.]

FORM No. 851—On judgment partially satisfied.

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That on the day of , 19 , in the superior court in and for the county of , state of , a judgment was duly given and made by said court in favor of plaintiff herein, and against this defendant, in an action in said court pending, wherein said was plaintiff and said was defendant [together with certain fictitious defendants, as to whom said action was dismissed], for the sum of \$, with legal interest and costs, taxed at \$.

2. That the defendant has not paid the said judgment, nor any part thereof, except, by garnishment of , a creditor of defendant, the sum of \$ was collected on , 19 , and applied as so much credit on account of said judgment; that the balance of said judgment, together with interest thereon from said last-mentioned date, remains wholly due and unpaid from the defendant to the plaintiff, and unsatisfied of record.

Wherefore, plaintiff prays judgment against defendant herein for said sum of \$, and costs \$, and interest thereon from , 19 , to , 19 , less said credit of \$, and interest thereon, or in all the sum of \$, and costs of this suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 852—On judgment for deficiency after foreclosure sale.

(In *Hibernia S. & L. Soc. v. Boyd*, 155 Cal. 193; 100 Pac. 239.)¹

[Title of court and cause.]

Plaintiff complains of the defendant, and for cause of action alleges:

1. [Allegation of incorporation of plaintiff.]

2. That on the 15th day of October, 1900, in the superior court of the city and county of San Francisco, state of California, a judgment

¹ The case of the *Hibernia S. & L. Soc. v. Boyd*, *supra*, related to a prior action, in which all the papers and records, including the record of both original and deficiency judgments, were destroyed in the San Francisco conflagration of April 18-20, 1906. The plaintiff made secondary proof of the judgments only, introducing no evidence as to the other papers and records, resting in this upon the admissions of the answer, directly or impliedly. The court held that the complaint, as against merely a general demurrer was sufficient, and that the proof made, in view of the admissions of the answer, warranted the judgment: *Hibernia S. & L. Soc. v. Boyd*, 155 Cal. 193, 100 Pac. 239.

and decree was duly given and made by said court in favor of this plaintiff, and against the defendant herein, in an action in said court last above named, pending and numbered 69,655 upon the records of said court, wherein this plaintiff was plaintiff and said defendant was defendant, for the sum of \$61,184.10; and for the foreclosure of a certain mortgage upon the lands described in a complaint in said action, and for the sale of said lands to satisfy the said judgment for said sum of \$61,184.10, and for the appointment of a referee to make sale of said lands, and out of the proceeds thereof, if sufficient, to satisfy said judgment for \$61,184.10, and if the sum so obtained for said lands be insufficient to satisfy said sum, the said court order that the clerk of said court enter a judgment in said action, against this defendant, for such deficiency; and which said judgment and decree was duly entered and recorded by the clerk of said court, in judgment book No. 57, at page 228, on October 15, 1900.

That thereafter, and in pursuance of said judgment and decree, the said referee only sold the said land, obtaining therefor the sum of \$56,184.10; and that he thereafter returned to this court his report in said cause, which, among other things, showed the sale of said lands and the amount received therefor, and that the clerk of said court did thereafter and on the 15th day of November, 1900, and in pursuance of said judgment and decree, and said report, enter and record a judgment against this defendant, in said action, for said deficiency, to wit, the sum of \$5,000, and docketed the same on said date of November 15, 1900.

3. That no part of said sum of \$5,000 has been paid, but that the same remains wholly due and unpaid.

Wherefore, plaintiff prays for a judgment against the said defendant for the sum of \$5,000, together with interest thereon from the said 15th day of November, 1900, at the rate of seven per cent per annum, and for the costs of suit.

Edwin L. Forster,
Attorney for plaintiff.

[Verification.]

FORM No. 853—On Judgment assigned.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , in the
court, in and for the county of , in this state [or before L. M.,

a justice of the peace in and for the town of], a judgment was duly given and made by said court [or justice] in favor of one N. O. and against the defendant herein, in an action wherein the said N. O. was plaintiff and the defendant herein was defendant [or otherwise, as the case was], for the sum of \$.

2. That on the day of , 19 , at , the said N. O. duly assigned said judgment to the plaintiff [of which the defendant had due notice].

3. [Same as paragraph 2, form No. 850.]
[Concluding part.]

FORM No. 854—On foreign judgment of court of general jurisdiction.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That at the times hereinafter mentioned, the court, in and for the county of , in the state of , was a court of general jurisdiction, duly created and organized under the laws of that state.

2. That on the day of , 19 , the plaintiff commenced an action in said court against the defendant by the issuance of summons [or other process] which summons was duly and personally served upon said defendant [or in which action the defendant appeared in person, or by attorney].

3. That thereupon such proceedings were had therein in said court, that on the day of , 19 , a judgment for the sum of \$ was duly given and made by said court, in favor of the plaintiff and against the defendant.

4. [Same as paragraph 2, form No. 850.]
[Concluding part.]

FORM No. 855—On foreign judgment of inferior tribunal.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That at the times hereinafter mentioned, L. M. was a justice of the peace, in and for the township of , in the county of , and state of , having authority under and by virtue of an act of said state, entitled , passed on the day of , 19 , to hold court, and having jurisdiction as such over actions of [set out jurisdiction sufficiently to include the cause of action].

2. That on the day of , 19 , at aforesaid, the plaintiff commenced an action against the defendant before the said justice, by filing his complaint, and causing summons to be issued by said justice on that day, for the recovery of [designate cause of action], which summons was duly and personally served on the defendant.

3. That on the day of , 19 , in said action, the plaintiff recovered judgment, which was duly given and made by said justice against the defendant, for the sum of \$, to wit, \$ for said debt, with \$ for interest from the said date, and \$ costs.

4. [Same as paragraph 2, form No. 850.]
[Concluding part.]

§ 365. ANSWERS.

FORM No. 856—Defense of payment.

[Title of court and cause.]

The defendant alleges that on the day of , 19 , and before the commencement of this action, he paid to the plaintiff \$, in full settlement and discharge of said judgment.

[Concluding part.]

FORM No. 857—Defense based upon vacation of judgment.

[Title of court and cause.]

[After introductory part:]

That on or about the day of , 19 , upon motion duly made, the said court duly made and entered an order setting aside and vacating the said judgment described in the complaint, and that said judgment is void and of no effect.

[Concluding part.]

FORM No. 858—Defense that judgment was obtained by fraud.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

1. That the judgment therein alleged was obtained by the plaintiff against the defendant by fraud and misrepresentation, in this: [Here state specifically the facts constituting such fraud; as, for example:] that the plaintiff, after the action in the complaint [petition] named was begun, came to this defendant, and with the pur-

pose of preventing the defendant from defending said action, falsely and fraudulently told him that he, the said plaintiff, intended to and would dismiss said action, and requested that defendant should not defend the same, and represented that the defendant need not be at any cost or expense therein.

2. That this defendant, in consequence of and relying upon said representations, did not appear in, or defend, said action at the term of court next thereafter held, and the plaintiff fraudulently, and without the defendant's knowledge, appeared and prosecuted said action in the defendant's absence, and took said judgment by the default of the defendant, so as aforesaid fraudulently procured.

Wherefore, the defendant prays that said judgment be adjudged void, and the plaintiff be forever restrained from enforcing it, and for defendant's costs of this action.

C. D., Attorney for defendant.

FORM No. 859—Defense of Invalidity of foreign judgment.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

1. Defendant alleges that no process was served upon him in the action mentioned in the complaint [or petition]; and that he never appeared in person or by attorney in said action.

[Concluding part.]

FORM No. 860—Defense of Invalidity of judgment against non-resident.

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition], alleges:

1. That the action in which the supposed judgment against him was alleged to have been recovered arose upon an alleged contract.

2. That when said action was commenced, this defendant was a non-resident of the state of _____, and a resident of _____.

3. That he never was personally served in the state of _____, or elsewhere, with summons in said action, and never appeared therein.

4. That no order for publication of the summons in that action was ever made. [Or state other facts showing failure to obtain jurisdiction.]

[Concluding part.]

Form of motion to set aside the judgment in an action for an accounting: *Childs v. Kansas City etc. R. Co.*, 117 Mo. 414, 416, 23 S. W. 373.

Form of petition in an action to set aside a judgment of foreclosure, and to restrain proceedings thereunder: *Lumpkin v. Williams*, 1 Tex. Civ. App. 214, 219, 21 S. W. 967.

Form of petition in an action to set aside two judgments: *Lantis v. Davidson*, 60 Kan. 389, 392, 56 Pac. 745.

Form of petition in an action to vacate a judgment: *Schnitzler v. Fourth Nat. Bank*, 1 Kan. App. 674, 675, 42 Pac. 496.

§ 366. ANNOTATIONS.

Remedy against an illegal judgment.—Where the statute affords a full, complete, and adequate remedy against an illegal judgment, by authorizing the aggrieved party to proceed by motion to vacate and set aside, and permitting an appeal from an order entered upon such motion, any one who has attacked a judgment by motion to vacate, and has failed to prosecute an appeal from the denial of his motion, can not subsequently maintain an action to cancel the judgment, since the question of the validity of the judgment is *res adjudicata*: *Chezum v. Claypool*, 22 Wash. 498, 61 Pac. 157, 79 Am. St. Rep. 955; *McCord v. McCord*, 24 Wash. 529, 64 Pac. 748; *Bunch v. Pierce County*, 53 Wash. 298, 101 Pac. 874, 875.

Decree in proceeding to vacate former judgment.—A proceeding under the Arkansas statutes (Kirby's Dig. §§ 4431-4437) to have a judgment set aside which was rendered at a former term is equivalent to an independent action instituted for that purpose, and the order of the court, after vacating the judgment or refusing to do so, is final, in the sense that it determines the rights of the parties under the judgment, even though after vacating the judgment it leaves the original still pending for further proceedings: *Ayers v. Anderson-Tully Co.*, 89 Ark. 160, 116 S. W. 199, 200, citing the following authorities from states having similar statutes: *Huntington v. Finch*, 2 Ohio St. 445; *Braden v. Hoffman*, 46 Ohio St. 639, 22 N. E. 930; *Weber v. Tschetter*, 1 S. Dak. 205, 46 N. W. 201; *Joyce v. New York*, 20 How. Pr. 439; *Henderson v. Gibson*, 19 Md. 234; *Curtiss v. Bell*, 131 Mo. App. 245, 111 S. W. 131.

A judgment procured by fraud may be set aside upon motion: *Hamilton v. McLean*, 139 Mo. 678, 41 S. W. 224; *Mayberry v. McClurg*, 51 Mo. 256; *Cross v. Gould*, 131 Mo. App. 585, 110 S. W. 672.

A *scire facias* proceeding to revive the lien of a judgment is not the institution of a new suit. No petition is required in such case, nor is the service of the usual process of summons or a copy of the petition required: *Bick v. Vaughn*, 140 Mo. App. 595, 120 Mo. 618, 620; *Sutton v. Cole*, 155 Mo. 206, 55 S. W. 1052; *Bick v. Tanzey*, 131 Mo. 515, 80 S. W. 902; *State v. Hoeffner*, 124 Mo. 488, 28 S. W. 1; *Sutton v. Cole*, 73 Mo. App. 518.

An original petition can in no respect be treated as a *scire facias* proceeding, even though there are references therein to a revival and renewal of the lien of a former judgment; for in a *scire facias* proceeding in which the lien of a judgment is sought to be revived and renewed, no petition whatever is required, whereas a petition must be filed when the suit is on a judgment: *Bick v. Vaughn*, 140 Mo. App. 595, 120 S. W. 618, 620, construing section 3715 Mo. Rev. Stats. 1899,—Ann. Stats. 1906, p. 2062.

TITLE XIII.

Actions for Negligence.

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CHAPTER CV.

Employers' Liability Cases, and Actions against Employees.

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§ 367. COMPLAINTS [OR PETITIONS].

FORM No. 861—By employee against railroad company, for damages resulting from injuries sustained in operation of defective machinery.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That the defendant is, and continuously during all the times hereinafter mentioned has been, a corporation organized under the laws of the state of ; that it is, and continuously during all said times has been, the owner and in the possession of a certain railroad known as Railroad, and of the tracks, cars, locomotives, rolling-stock, and other equipment and appurtenances thereto belonging, and is, and was during all said times, using the same for the transportation of goods and passengers for hire.

2. That the plaintiff, on the day of , 19 , was in the employ of the defendant, as engineer upon a locomotive steam-engine, used and operated by defendant on its said tracks.

3. That said steam locomotive was defective and insecure, and the boiler thereof was defective, unsafe, and dangerous, but of such defects plaintiff had no knowledge, nor means of knowledge, information, or notice thereof; that by reason of said defects, and by reason of the failure, through the carelessness and neglect of the defendant to furnish a safe and secure steam locomotive to be used by the plaintiff in his said employment, on the said date, and while the plaintiff was engaged in the performance of his duties as such engineer under said employment, the boiler of said steam locomotive exploded, whereupon large quantities of steam and hot water escaped therefrom, and, without any fault or negligence on his part, plaintiff was thereby severely scalded and injured about the face and hands and body.

4. That by reason of said injuries sustained as aforesaid plaintiff became, and for a long time thereafter remained, ill; that said injuries sustained as aforesaid are of a permanent nature, and that ever since receiving the same the plaintiff has been, and will hereafter be, prevented thereby from pursuing his regular employment or business; that by reason of said injuries plaintiff was obliged to engage the services of a physician, and was further obliged to expend in hospital service and for medicines the sum of \$; and that,

in all, the plaintiff has been damaged by the acts of the defendant aforesaid in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for \$,
and plaintiff's costs of suit. A. B., Attorney for plaintiff.

[Verification.]

FORM No. 862—By servant, to recover damages for personal injuries sustained from negligence of employer in requiring performance of labor with which the servant was not familiar.

(In *Crawford v. Bonners Ferry L. Co.*, 12 Idaho 678; 87 Pac. 998; 10 Am. & Eng. Ann. Cas. 1.)

[Title of court and cause.]

Plaintiff complains of the defendant, and for cause of action alleges:

1-4. [After averments that the defendant is a corporation organized and existing under the laws of the state of Wisconsin, and doing a sawmill business in Kootenai County, state of Idaho, and that about one year prior to August 24, 1904, plaintiff entered the employ of defendant, as teamster, to haul and skid logs and timber in the forests owned and used by defendant in connection with its sawmill, and after describing apparatus, machinery, and dump-carts used for the purpose of disposing of refuse, the complaint proceeds:]

5. That on the day of , 1904, and while plaintiff was in the performance of his said duties in hauling and skidding logs and timbers in the forests of defendant, pursuant to said employment, the defendant directed and required plaintiff to suspend said work, and to haul [etc., here describing the work he was required to perform]; that thereupon plaintiff objected to performing said last-mentioned service, and informed defendant that he did not understand said work, or the manner of using dump-carts, whereupon defendant further directed and required plaintiff to perform said last-mentioned labor, and insisted that he do so, and plaintiff proceeded to haul laths as directed by defendant as aforesaid.

6. That it was then and there, and at all times, the duty of the defendant to furnish, keep, and maintain a safe, sufficient, and suitable place for plaintiff to work in, and to provide and maintain sufficient, suitable, and safe appliances with which to perform said labor, and to provide and maintain sufficient, suitable, and safe roads over which to haul said laths, but that, disregarding its duty in the

premises and in this respect, it had knowingly, carelessly, and negligently caused said car and box to be so constructed that they were too low to safely allow said dump-cart to pass under; * * * and defendant at all of the times herein mentioned, knowingly, carelessly, and negligently kept and maintained them in such unsafe and dangerous condition, and knew of their dangerous and unsafe condition, and knew that it was unsafe and dangerous for plaintiff to haul said laths with said dump-cart, of all of which plaintiff had no knowledge; * * * that said facts could not be known or determined by plaintiff from any inspection which plaintiff was permitted to make, or was able to make, before or at the time of performing said work in the performance of which he was injured; * * * that the element of danger resulting, or that might result, from such conditions as aforesaid, was a latent and not an obvious danger.

7. That on the day last aforesaid, and while plaintiff was hauling said laths as directed and required by defendant as aforesaid, without any assistance, * * * and while he was exercising due care and caution, without any fault of plaintiff, the hind end of said dump-cart struck against the timbers and ceiling of said box over said driveway thereunder, and caused the fore part of said dump-cart to be suddenly and with great force and violence raised and thrown up to and against said timbers, by reason of which plaintiff was caught and held between and against said dump-cart and timbers, whereby [here follows statement of injuries received and damages].

Wherefore, plaintiff demands judgment against the defendant in the sum of \$2,000 damages as aforesaid, and costs of suit, and for other and further relief.

[Verification.]

R. E. McFarland,

Attorney for plaintiff.

FORM No. 863—Under employers' liability act.

(In *Mitchell v. Colorado M. & E. Co.*, 12 Colo. App. 277; 55 Pac. 736.)¹

[Title of court and cause.]

[After introductory part:]

1. That the defendant is a corporation duly organized under the laws of the state of Colorado, and owns and operates what are known as the New Lindell Mills, situated in the city of Fort Collins, county

¹ The complaint in form No. 863, under the employers' liability act (Colo. Laws 1892, p. 129), was held to state a complete cause of action and right of recovery by the plaintiff, under the statute of 1877, which is not controlled or affected by the act of 1892 aforesaid. The action is based upon the plaintiff's interest in the life

of Larimer, and state of Colorado, with its principal office situated in the city of Denver, and state of Colorado.

2. That at all the times hereinafter mentioned the defendant was engaged in rebuilding said mills at Fort Collins, the said mills having been theretofore destroyed by fire; that at said time, and for a long time prior thereto, one Benjamin F. Hottel was the resident agent and manager of said mills for and on behalf of defendant company, vested with general power in the management of said mills, with the right to employ and discharge men, and direct and control their actions in and about the working of said mills, as well as the rebuilding of the same; that said latter work, and all work herein mentioned, was under the immediate supervision, direction, and control of said Hottel, as the resident agent, manager, and representative of defendant company.

3. That on the 7th day of August, 1896, one William M. Mitchell, who was then the unmarried son of plaintiff, was employed by defendant company, through its manager aforesaid, to assist in raising a smokestack at said mills.

4. That the said William M. Mitchell was at that time a few months over the age of twenty-two years, and had no knowledge or previous experience with the handling or raising of smokestacks, and was uninformed and unacquainted with the methods employed and machinery used in conducting such operations, and relied upon the knowledge, judgment, skill, and experience of said manager Hottel, which he believed said Hottel possessed.

5. That under the direction of said manager Hottel, so acting for and representing defendant company, a derrick was provided for lifting said smokestack into position, which derrick had not been constructed for that purpose, and could not lift any greater weight than 2,500 pounds, of which facts said Mitchell had no notice or knowledge.

6. That plaintiff is informed and believes, and so avers the fact to be, that the said smokestack weighed about 4,500 pounds; that on said last-mentioned date, under the direction of said manager as

of the deceased, her direct dependence upon him, as his mother, for maintenance and support, and does not seek to recover damages sustained by the deceased employee. Under the act of 1877, no notice was required to be given the employer before such suit could be maintained. The court, therefore, held that it was error to sustain a demurrer to this complaint on the ground of a failure to allege such notice: *Mitchell v. Colorado M. & E. Co.*, 12 Colo. App. 278, 55 Pac. 736. (The form as given herein eliminates several repetitions contained in the original complaint.)

aforesaid, the said smokestack was connected with the lifting apparatus of said derrick, the block and tackle being then unskillfully, carelessly, and negligently caused to be attached to an eye-bolt in said derrick, so that the whole of the weight of said stack was placed upon a small bolt; that the said manager then and there caused the windlass to which the rope was attached for lifting the said stack to be negligently and carelessly placed directly under the stack between the engine-house and elevator-building, so that while said stack was being hoisted it was immediately over the heads of those employed upon the windlass, and that the said Mitchell, having no notice or knowledge that said derrick was being used in an unsafe manner, or that the said manager had not exercised reasonable prudence, skill, and judgment in providing and placing said machinery, continued to work at said lifting apparatus; that while so engaged at the windlass, turning the same, and without any fault or neglect on his part, the eye-bolt holding said apparatus to the stack broke, and the said stack fell, striking said Mitchell and causing his immediate death.

7. That the death of the said William M. Mitchell was caused by the negligence of the defendant company, and of its manager, as its principal representative as aforesaid, in providing unsafe and defective machinery aforesaid, and through the grossly negligent manner and method in which the same was manipulated and used as aforesaid.

8. That the said William M. Mitchell was in sound bodily health at the time of his death, and at the time thereof, and for a long time prior thereto, supported plaintiff from his earnings, who, being advanced in years and in poor bodily health, was dependent upon her said son for maintenance and support, and which said earnings at the time of his death averaged \$600 per annum.

9. That the bonds of matrimony existing between plaintiff and her husband, Michael Mitchell, were absolutely dissolved, by decree of divorce duly given, made, and entered of record in the county court of Jefferson County, state of Colorado, on the 25th day of July, 1882; and in and by the terms of said decree, plaintiff was given the custody of the minor children, William Mitchell and Kate Mitchell, and charged with their support and maintenance, without any allowance from said Michael Mitchell.

10. That by reason of the default and negligent conduct of defendant company, and of its manager, as principal and representative, in

causing the death of said William M. Mitchell, the plaintiff has been damaged in the sum of \$5,000.

Wherefore, plaintiff prays judgment against the defendant company for the sum of \$5,000, and for costs of suit.

Frank J. Annis,
Garbutt & Garbutt,
Attorneys for plaintiff.

FORM No. 864—By employer, for servant's negligence.

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That on and prior to the time hereinafter mentioned the defendant was, at his request, for reward to him, employed by the plaintiff to [here state work which the defendant was to perform], and as his servant.

2. That on the day of , 19 , the defendant [here state as to work] in so careless and improper a manner that plaintiff was damaged in the following particulars, to wit: [Here specify], and thereby the plaintiff lost [here state], and incurred divers expenses, to wit, \$, in [here state], to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 865—By employer, for repayment of money advanced for services.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant agreed to render his services to the plaintiff as , for the term of , in consideration of \$, to be paid therefor by the plaintiff.

2. That on the day of , 19 , at , the plaintiff advanced to the defendant, at his request, on account of services to be thereafter rendered, in pursuance of said agreement, the sum of \$.

3. That the defendant has wholly neglected and refused to render such services, although demanded by the plaintiff so to do.

4. That no part of said sum so advanced has been repaid, and the whole thereof remains due and payable from the defendant to the plaintiff.

[Concluding part.]

§ 368.—ANSWERS.

FORM No. 866—Defense based upon failure of plaintiff to give notice prescribed by statute as condition precedent to action.

(In Mathieson v. St. Louis etc. R. Co., 219 Mo. 542; 118 S. W. 9.)

[Title of court and cause.]

[After the defendant set out a general denial and plea of contributory negligence, and a plea of assumption of risk, the defense based upon failure to give the statutory notice was alleged as follows:]

4. For a fourth and further answer and defense to said amended petition, defendant avers that plaintiff has stated in said petition that he was working for defendant in and about its yards and connections in Wyandotte County, Kansas, and that at the time he was injured he was working in said Wyandotte County, Kansas, and the accident of which plaintiff complains in his petition happened in said county, state of Kansas; and defendant further avers that the law of the state of Kansas set up in said amended petition was amended on March 4, 1903, by the legislature of the state of Kansas, and, as amended, and as in force at the time of said accident, is as follows: [Here follows a copy of the statute as amended, for the wording of which see paragraph 1, annotations to this chapter.]

Defendant further avers that plaintiff has failed to comply with said law of the state of Kansas, in that he failed to give to defendant within ninety days after the occurrence of said accident any notice of the injury sustained by him, or any notice stating the time and place thereof, or the time or place thereof, and that by reason of plaintiff's said failure to give said or any notice as provided by said statute, plaintiff can not recover herein.

W. F. Evans,

I. P. Dana,

W. J. Orr,

Attorneys for plaintiff.

[Concluding part.]

FORM No. 867—Denial, and defense of contributory negligence and assumed risk.

[Title of court and cause.]

Now comes the defendant in the above-entitled action and answers the complaint of plaintiff on file herein as follows:

1. Defendant denies each and every allegation in said complaint contained. [If the complaint be verified, or if required by statute, make denials specific.]

[Defense of contributory negligence and assumed risk.]

For a further and separate defense, defendant alleges:

1. That plaintiff's duties in working in or upon [here describe the work in which defendant was engaged under the direction of plaintiff] did not require him to go to the place or to come in contact with the machinery [or apparatus, etc., causing the injury], and therefore the injury alleged to have been suffered by plaintiff in his complaint herein was consequent upon, and due to plaintiff's own carelessness and negligence, and not to that of the defendant.

2. That the said machinery [or other apparatus, describing it] was in plain view of the plaintiff when he entered defendant's service, and so remained during all the time of his employment, and, with full notice and knowledge of its construction, condition, and operation, defendant voluntarily entered upon the work which he was employed to do, and continued therein until the time of his accident without objection or complaint, and thereby waived the duty of defendant to otherwise safeguard said machinery [or other apparatus, etc.], and defendant assumed all risk incident thereto.

Wherefore, defendant prays that plaintiff take nothing by his action herein, and that defendant be given judgment for his costs.

C. D., Attorney for defendant.

[Verification.]

For annotations as to the defense of contributory negligence generally, see ch. CXI, paragraphs 20 to 30.

FORM No. 868—Defenses—(1) contributory negligence of plaintiff, and (2) negligence of fellow-servant of plaintiff.

(Cragg v. Los Angeles Trust Co., 154 Cal. 663; 98 Pac. 1063.)

[Title of court and cause.]

Comes now the defendant, and for answer to plaintiff's complaint:

1-3. [After specific denials of the averments of the complaint, the following defenses are set out:]

[Defense of contributory negligence.]

4. And for a second and further defense to plaintiff's alleged cause of action, defendant alleges that the alleged injury and damage to plaintiff was proximately caused by his own negligence and want of care.

[Defense of negligence of fellow-servant of plaintiff.]

5. And for a third and further defense to plaintiff's alleged cause of action, defendant alleges that the accident referred to in plaintiff's complaint, and the injury and damage to the plaintiff alleged to have resulted therefrom, were caused by the negligence and want of care of a fellow-servant of plaintiff, who at the time of the happening of said accident was engaged with the plaintiff in the same general business of this defendant, and without any fault or negligence on the part of this defendant.

Wherefore, the defendant prays that plaintiff take nothing by this action, and that defendant recover its costs and disbursements.

Hunsaker & Britt,

[Verification.]

Attorneys for defendant.

Form of complaint in an action for damages for injuries caused by the negligence of employer: *Trihay v. Brooklyn Lead Min. Co.*, 4 Utah 468, 482, 11 Pac. 612, 618, 15 Morr. Min. Rep. 535.

Form of complaint in an action by a day laborer, against his employer, a railroad company, for damages for breach of contract, and negligence, in that defendant failed to supply him with good and suitable board and lodging: *Clifford v. Denver S. P. & P. R. Co.*, 9 Colo. 333, 12 Pac. 219.

Form of petition in an action by a brakeman against a railroad company for personal injuries received in stepping from a car for the purpose of turning a switch: *Kansas City etc. R. Co. v. Kier*, 41 Kan. 661, 21 Pac. 770, 771, 13 Am. St. Rep. 311.

Form of petition in an action for damages for a personal injury caused by the alleged negligence of plaintiff's co-employees: *Union Pacific R. Co. v. Harris*, 33 Kan. 416, 6 Pac. 571.

Form of petition in an action for damages for personal injuries received by plaintiff on account of the alleged negligence of defendant in providing for her use, as an employee, defective and dangerous machinery: *Hoepper v. Southern Hotel Co.*, 142 Mo. 378, 44 S. W. 257.

Form of petition in an action to recover damages for personal injuries alleged to have been received by the plaintiff while in the employ of the defendant: *Atchison etc. R. Co. v. Ledbetter*, 34 Kan. 326, 8 Pac. 411.

Form of petition in an action by a brakeman against a railway company to recover damages for injuries received while in the performance of his duties, through the negligence of the company's inspector: *Missouri Pacific R. Co. v. Dwyer*, 36 Kan. 58, 59, 12 Pac. 352, 353.

Form of petition in an action for personal injuries caused by the alleged negligence of the defendant in providing an unsafe hand car: *Solomon R. Co. v. Jones*, 34 Kan. 443, 455, 8 Pac. 730, 732.

Form of petition in an action for damages for personal injuries resulting from the negligence of the defendant in not furnishing safe tools: *Atchison etc. R. Co. v. Sadler*, 38 Kan. 128, 129, 16 Pac. 46, 5 Am. St. Rep. 729.

Form of petition in an action for damages for personal injuries received by plaintiff while engaged in the capacity of a workman and employee of the defendant in the sinking of a shaft: *Morbach v. Home Mining Co.*, 53 Kan. 731, 732, 37 Pac. 122, 123.

Form of petition in an action for damages for the alleged wilful negligence and misconduct of the defendants towards the plaintiff's minor child while she was in the service of the defendants: *Larson v. Berquist*, 34 Kan. 334, 335, 8 Pac. 407, 55 Am. Rep. 249.

For the substance of averments charging the defendant with negligence in the operation of an elevator, the plaintiff having suffered personal injuries while in the employ of the defendants, held sufficient to admit of proof of negligence of the defendant, although the petition might have been more skilfully drawn, see *Modlin v. Jones & Co.*, 84 Neb. 551, 121 N. W. 984, 987.

For a form of complaint in an action for personal injuries caused by the alleged negligent operation of a railroad in a logging-camp, held sufficient as against a general demurrer, notwithstanding its deficiency in logical order and technical language, and notwithstanding its somewhat vague statements, see *Vukelis v. Virginia L. Co.*, 107 Minn. 68, 119 N. W. 509.

Form of instructions to jury in an action for damages for injuries caused by the explosion of an engine: *Mulligan v. Montana Union R. Co.*, 19 Mont. 135, 47 Pac. 795, 797.

§ 369. ANNOTATIONS.—Employers' liability cases, and actions against employees.

1. Notice as condition precedent.—Kansas statute.
2. Complaint in action for negligence held sufficient.
3. Insufficient showing of negligence.
- 4, 5. Defense of assumption of risk.—Distinguished from contributory negligence.
6. Risk, when deemed assumed.
7. Burden of proof as to assumed risk.
8. Instruction based upon assumed risk.
- 9, 10. Negligence of fellow-servant.
11. Liability of servant to master for acts of servant's minor children.

1. Notice as condition precedent.—Kansas statute.—The giving of a notice, where required by statute as a condition precedent to the commencement of an action for negligence, etc., is one of the essential elements of the plaintiff's case.

Without that allegation the petition is fatally defective, and does not state facts sufficient to constitute a cause of action: *Mathieson v. St. Louis etc. R. Co.*, 219 Mo. 542, 118 S. W. 9, 10, citing the Kansas statute, the same being that upon which this action was based, as amended on March 4, 1903, and which reads as follows: "Every railroad company organized or doing business in this state shall be liable for all damages done to any employee of said company in consequence of any negligence of its agents, or by any mismanagement of its engineers, or other employees, to any person sustaining such damage; provided, that notice in writing of the injury so sustained, stating the time and place thereof, shall have been by or on behalf of the person injured to such railroad company within ninety days after the occurrence of the accident."

2. A complaint in an action for damages for personal injury received by plaintiff while in defendant's employ as a teamster held sufficient as against a general demurrer thereto, there being no criticism in these particulars, although the same was uncertain and indefinite in some of its allegations, and held, also, a judgment for defendant, on sustaining the demurrer, was erroneous. The following is, in brief, a statement of the facts alleged: The defendant corporation owns and conducts a foundry and machine-shop in the city of Butte. The plaintiff was at the time he was injured in its employ, as a teamster, and in this capacity his office was to haul from place to place about the premises heavy machinery and castings whenever in the course of defendant's operations it became necessary. On August 1, 1904, he was directed to move from the foundry to the machine-shop an iron casting weighing about 1,500 pounds. Having loaded it upon his wagon and hauled it to the place designated in the machine-shop, he was engaged in unloading and lowering it to the floor. To enable him to do this, he was furnished with an appliance consisting of a crane, blocks, and a chain. The process of unloading was intended to be accomplished by first lifting the casting from the wagon by means of the appliance mentioned, and holding it suspended from the chain until the wagon was removed, and then lowering

the casting to the floor. The unloading had been accomplished up to the point when it became necessary to lower the casting. It was then suspended about five feet from the floor. To effect this it was necessary that the appliance be loosened, presumably so that the chain would run through the blocks, and thus allow the casting to descend gradually, under plaintiff's control. While the plaintiff was in the act of adjusting the appliance in order to lower the casting, it became necessary for him to take hold of it for that purpose. The chain, blocks, and the casting fell upon his right leg, so crushing and mangling it that amputation became necessary. [The negligence with which defendant is charged is alleged as follows:] That said chain so around said casting, and which was so furnished to this plaintiff for such use was wholly insufficient and unsafe in this, to wit, that the same was not of sufficient size to hold or bear the weight of said casting, and by reason thereof it was not of such strength as was required for such casting, and was too weak to hold the same, all of which was well known to said defendant, and of which this plaintiff was ignorant. Plaintiff further alleges that defendant was guilty of gross negligence in not furnishing plaintiff a sound, safe, and substantial chain with which to handle said casting, and that but for the gross carelessness and negligence of defendant in this regard plaintiff would not have received said injury. Plaintiff further alleges that said appliance, consisting of crane, blocks, and chain, were the property of defendant, and were furnished for use by defendant, and that plaintiff used the same under the direction and orders of defendant. [It was then alleged that, by reason of the injury thus suffered, the plaintiff was permanently disabled, that he suffered great mental and physical pain and anguish, and that he was put to expense for medical treatment, etc.]: *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619, 620.

3. Insufficient showing of negligence.— A complaint in an action brought to recover personal damages suffered by the plaintiff while in the employment of the defendants, and alleged to have been caused by their negligence in numerous particulars specified, which contains no

further specification of the negligence than that the same was committed "by the defendants and their servants," is wholly insufficient, for the reason that from this allegation it does not appear that the plaintiff himself was not the servant whose negligence caused the accident: *Schreiner v. Grant Brothers*, 3 Cal. App. 661, 662, 86 Pac. 912, (to recover personal damages for negligence).

4. The defense of assumption of risk is affirmative in character, and must be pleaded specifically before it can be availed of by the defendant: *Coulter v. Union Laundry Co.*, 34 Mont. 590, 87 Pac. 973; *Nord v. Boston etc. Co.*, 33 Mont. 464, 84 Pac. 1116, 89 Pac. 647; *Longpre v. Big Blackfoot M. Co.*, 38 Mont. 99, 99 Pac. 131, 132.

5. Assumption of risk and contributory negligence are separate defenses, and while it frequently happens that there is no practical importance in distinguishing the two where the same state of facts would make out a defense, whether called by the one name or the other, yet they rest upon different bases, and each should be approached from a different viewpoint. Of course, where the danger is obvious the two defenses are tested by the same standard in that particular, and the differences are more theoretical than practical: *Johnson v. Mammoth Vein Coal Co.*, 88 Ark. 243, 114 S. W. 722, 724, 123 S. W. 1180; *Choctaw etc. R. Co. v. Jones*, 77 Ark. 367, 92 S. W. 244, 4 L. R. A. (N. S.) 837, 7 Am. & Eng. Ann. Cas. 430; *St. Louis etc. R. Co. v. Mangan*, 86 Ark. 507, 112 S. W. 168, 13 Ark. Law Rep. 545; *Narramore v. Cleveland etc. R. Co.*, 87 C. C. A. 499, 96 Fed. 298, 48 L. R. A. 68.

6. Risk, when deemed assumed.—The risk where obvious is deemed to have been assumed by the plaintiff: *Jones v. Pioneer Cooperage Co.*, 134 Mo. App. 324, 114 S. W. 94, 96; *Knorpp v. Wagner*, 195 Mo. 637, 93 S. W. 961; *Beasley v. Linahan Transfer Co.*, 148 Mo. 413, 50 S. W. 87; *Bradley v. Railway*, 138 Mo. 293, 39 S. W. 763; *Lee v. Railroad*, 112 Mo. App. 372, 87 S. W. 12.

7. Burden of proof as to assumed risk.—Where the defendant pleads assumption of risk by the plaintiff because of his alleged continuance in a place of danger while in the defendant's employ, and pleads plaintiff's knowledge of the risk,

the burden is upon the defendant to establish by a preponderance of the evidence that the plaintiff knew and appreciated the peril to which he was exposed: *Cinkovitch v. Thistle Coal Co.*, 143 Iowa 595, 121 N. W. 1036, 1038, citing upon the point that knowledge and appreciation of the risk are always essential elements in the servant's assumption of risks arising from his alleged negligence: *Long v. Johnson*, 134 Iowa 336, 111 N. W. 984; *Cushman v. Carbondale Co.*, 116 Iowa 618, 88 N. W. 817; *Vohs v. Shorthill*, 124 Iowa 471, 100 N. W. 495; *Calloway v. Agar*, 129 Iowa 1, 104 N. W. 721; *Mace v. Boedker*, 127 Iowa 721, 104 N. W. 475; *Gorham v. Stockyards Co.*, 118 Iowa 749, 92 N. W. 698; *Huggard v. Glucose Co.*, 132 Iowa 724, 109 N. W. 475.

8. An instruction based upon an assumed risk in an action to recover damages for negligence is improper where the defense of assumed risk is not pleaded: *Lewis v. Texas etc. R. Co.* (Tex. Civ. App.), 122 S. W. 605, 606, citing *International etc. R. Co. v. Harris*, 95 Tex. 346, 67 S. W. 315; *Missouri etc. R. Co. v. Jones*, 35 Tex. Civ. App. 584, 80 S. W. 852.

9. Negligence of fellow servant.—By a Missouri statute, the defense based upon negligence of a fellow-servant is taken away where the conditions and circumstances are such as the statute provides: *Lewis v. Wabash R. Co.*, 142 Mo. App. 585, 121 S. W. 1091, 1092.

10. Negligence of a helper or fellow-servant is a defense of the same nature as that of assumption of risk, and can be availed of, if at all, only by special allegation: *Longpre v. Big Blackfoot M. Co.*, 38 Mont. 99, 99 Pac. 131, 132. See *Duff v. Willamette Steel Works*, 45 Ore. 479, 78 Pac. 363, 668; *Laying v. Mt. Shasta M. S. Co.*, 135 Cal. 141, 67 Pac. 48; *Ehl v. Northern Pacific R. Co.*, 1 N. Dak. 336, 48 N. W. 222, 26 Am. St. Rep. 621, 12 L. R. A. 97.

11. Liability of servant to master for acts of servant's minor children.—The liability of a parent for the act of a minor child is held to rest upon the same basic facts as the liability of a master for the acts of his servant, and does not result from the fact of the tort or act being purposely or wilfully done, but from its being done in doing the master's or servant's business. Hence, in an ac-

tion brought against a parent to recover damages resulting from a fire caused by his minor child, if the act complained of is the setting of a fire, it is not a sufficient pleading of liability that the servant or child was engaged in the business of the master of the parent; but it must appear that the setting of the fire was

a part of that business, or resulted from some act done in the performance of such business: *Mirick v. Suchy*, and *Barry v. Suchy*, 74 Kan. 715, 87 Pac. 1141, 1142, 11 Am. & Eng. Ann. Cas. 366, (against parent for damages caused by negligence of minor child).

CHAPTER CVI.

Negligence of Various Persons Owing a Contractual Duty.

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§ 370. COMPLAINTS [OR PETITIONS].

FORM No. 869—Against attorney, for negligent prosecution of a suit.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant is, and at the times hereinafter mentioned was, an attorney of the court of this state; that the plaintiff on or about the day of , 19 , retained and employed the defendant as such attorney, to prosecute and conduct a certain action in the court of the county of , state aforesaid, on behalf of this plaintiff, against one L. M., for the recovery of

\$, due from him to this plaintiff; that the defendant then and there accepted and entered upon such retainer and employment, and undertook to prosecute said action in a proper, skilful, and diligent manner, as the attorney of the plaintiff.

2. That the defendant might, in case he had prosecuted said action with due diligence and skill, have obtained final judgment therein for this plaintiff before the day of , 19 , but not regarding his duty or employment, he so negligently and unskilfully conducted said action, that by his negligence, delay, and want of skill, he did not obtain judgment until the day of , 19 , and that meanwhile the said L. M. had become insolvent; whereby the plaintiff was hindered and deprived of the means of recovering said sum of money; that the same has not, nor has any part thereof, been recovered or made by the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 870—Against attorney, for negligent defense of an action.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Allegation of employment of attorney to defend, etc. For general averments see paragraph 1, preceding form.]

2. That such proceedings were had in such action that afterwards, to wit, on the day of , 19 , it became and was the duty of the defendant, under and by virtue of his said retainer and his said promise and undertaking [to interpose a proper and sufficient answer to the complaint therein], but he wholly omitted and neglected so to do, and by reason thereof, and by and through the neglect and default of the said defendant in that behalf [judgment by default was obtained in the said action against plaintiff, and by reason thereof plaintiff was compelled to pay the said L. M. \$, the sum so recovered by him], and also, by reason of the premises, plaintiff was put to costs and charges in and about his endeavoring to defend the said action, amounting in the whole to a large sum of money, to wit, \$, and has lost and been deprived of the means of recovering the same back from the said L. M., to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 871—Against an agent, for carelessly selling to an insolvent.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant undertook with and for the plaintiff, as his agent, and for compensation to be paid by him, to sell goods belonging to the plaintiff, to wit, [designating goods,] of the value of \$, and thereupon received the same from him for that purpose.

2. That the defendant did not use due diligence in the sale of the same, but carelessly and negligently sold the said goods for the plaintiff to a person who was then and ever since has been, insolvent, defendant then well knowing said person's financial condition, and without receiving the price therefor, or taking security for the payment thereof; whereby the plaintiff has lost said goods and the value thereof, to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 872—Against an agent, for negligent delay in the sale of goods.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Averment as to employment.]

2. That the defendant failed to use due diligence to sell said goods, but, on the contrary, unreasonably delayed so to do, by reason whereof the same were afterwards sold by the defendant for the plaintiff, and produced \$ less than the same would have produced had the defendant used due diligence in selling the same; that by reason of defendant's said negligence the plaintiff incurred \$ expenses in storing the same, to plaintiff's damage in the total sum of \$.

[Concluding part.]

FORM No. 873—Against negligent bailee.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the plaintiff, on or about the day of , 19 , at , at the special instance and request of the defendant, caused to be delivered to defendant [a certain piano], the property of the plaintiff, of the value of \$, to be taken care of and safely and securely kept by defendant for the plaintiff.

2. That the defendant undertook and then and there agreed with the plaintiff to take due and proper care of the said [piano] for the plaintiff, and to redeliver the same to the plaintiff, to wit, at .

3. That the defendant, not regarding his duty in that behalf, did not take due or proper care of the said [piano], nor did he, when he was so requested as aforesaid, or at any time, redeliver the same to the plaintiff; that by and through the carelessness, negligence, and improper conduct of the defendant, the said [piano] became and was wholly lost to the plaintiff [or damaged, as the case may be], to plaintiff's damage in the sum of \$.

[Concluding part.]

FORM No. 874—Against a physician, for malpractice.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant being then a physician, the plaintiff, at defendant's request, employed the defendant as such physician for a reward, to attend on and administer medicines to, and endeavor to cure the plaintiff of a malady from which he then suffered.

2. That the defendant then entered upon such employment, but did not use due and proper care or skill in endeavoring to cure the plaintiff of the said malady, in this [state wherein the want of skill was, and the acts of negligence].

3. That by reason of the premises the plaintiff was injured in his health and constitution, suffered great pain, and was unable to attend his business for months, and has been greatly injured in health, and was obliged to incur an expense of \$ in endeavoring to be cured of said sickness, which was prolonged and increased by said negligence and improper conduct of the defendant, to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 875—Against a surgeon, for malpractice.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff broke and fractured the bones of his right leg, and on the said day, the defendant, holding himself out as a surgeon, the plaintiff employed him as

such surgeon, for reasonable reward to be paid therefor, to set said broken bones in their proper place, and to attend on the plaintiff until he should be cured.

2. That the defendant thereupon entered upon said employment, but was so negligent and unskilful in setting said bones, and in attempting to reduce said fracture, and in attending and dressing said leg, that [state the consequences].

3. That by reason of said negligence and unskilfulness, [set out the special damages], to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 876—For negligence of a dentist.

(In *McGehee v. Schiffman*, 4 Cal. App. 50; 87 Pac. 290.)¹

[Title of court and cause.]

Comes now the above-named plaintiff and, with leave of court first had and obtained, files this her amended complaint, and for cause of action alleges:

1. That the defendant, A. F. Schiffman, at all the times mentioned in this her amended complaint, was a dentist, professing and practising in the city of Los Angeles, county of Los Angeles, state of California, and was at all the said times, and is now, obtaining and doing business, and carrying on said profession and practice of dentistry in said city, county, and state, under the name and style of the Schiffman Method Dental Company; that the said A. F. Schiffman is the owner and sole proprietor of said company.

2. That on the 7th day of December, 1903, the plaintiff Olive C. McGehee, visited the place of business of defendant in said city and consulted with defendant regarding her teeth, and defendant then and there, and for a pecuniary consideration or reward, did assume and undertake to extract from her jaws and to remove from her mouth certain of her teeth; and did then and there extract seven of said teeth and remove all of the same from her mouth, excepting one of said teeth, which by defendant's carelessness, negligence, and unskilfulness was permitted and allowed by him to drop and pass into plaintiff's right lung, without any fault or negligence on her part, where said tooth remained for a long period of time, to wit,

¹ This complaint, form No. 876, was held by the court as sufficient, and in no sense as ambiguous or uncertain: *McGehee v. Schiffman*, 4 Cal. App. 50, 87 Pac. 290.

from said December 7, 1903, until August 21, 1904, whereby, and by reason whereof, plaintiff was permanently injured in her health and body, and especially in her said lung, and by reason thereof became permanently sick, sore, diseased, and disabled, and suffered, and continued to suffer, great mental anguish and distress and physical pain, and ever since said time of said operation by defendant, and by reason thereof, she has been declining in health and bodily vigor, whereas at all times for many years prior and up to the time of said operation performed by defendant, she, plaintiff, had been in good, sound bodily health, and able to do and perform, and did do and perform, all her necessary and proper household and family duties, labor, and service, but which now, and ever since said time of said operation, and by reason thereof, she is unable to do or perform.

3. That by reason of the premises, and of said negligence, carelessness, and unskilfulness on the part of defendant in said operation, the plaintiff was compelled to pay, and did pay, the sum of \$493, or thereabouts, medical expense in attempting to be cured, and has, also, suffered damages in the sum of \$10,000.

Wherefore, plaintiff demands judgment against the defendant, A. F. Schiffman, for the sum of \$10,493, and the costs of this action.

E. Edgar Galbreth,

[Verification.]

Attorney for plaintiff.

FORM No. 877—For negligence of grocer in selling a dangerous explosive.

(In *Kenny v. Kennedy*, 9 Cal. App. 350; 99 Pac. 384.)

[Title of court and cause.]

Plaintiff complains of the defendant, and for cause of action alleges:

1. That the plaintiff and Rebecca Kenny are now, and were at all the times hereinafter mentioned, husband and wife, and that, as the wife of this plaintiff, the said Rebecca Kenny at all times had authority to buy and purchase for and on behalf of this plaintiff, and to act as his agent in the buying and purchasing, of all household supplies, and particularly the oil hereinafter mentioned.

2. That the plaintiff is now and was at all times hereinafter mentioned, the owner of [here lot is described], and was at all said times the owner and in possession of that certain five-roomed, one-story, frame dwelling-house situated on said lot, being known and designated as No. 1516 Winfield Street, and that the value of

the said house at and prior to the time of its destruction as hereinafter alleged was the sum of \$750.

3. That the plaintiff was at all the times hereinafter mentioned the owner and in the possession of all the personal property contained in the said house, which consisted of furniture [etc., describing other property], and all property being in said house on the 29th day of September, 1906, and that the same was at the time of its destruction hereinafter alleged worth the sum of \$750.

4. That the defendant at all the times hereinafter mentioned was, and now is, a dealer in groceries, coal-oil, gasoline, and other merchandise at a store known and designated as No. 1601 West Twelfth Street in said city.

5-7. [Here follow averments of facts showing the negligence of the defendant in selling the plaintiff upon an order for coal-oil, a quantity of gasoline, the same having been put in a can marked "coal-oil" and delivered as such to plaintiff's wife.]

8. That the said gasoline so delivered by the defendant as aforesaid was of a highly explosive nature or character, and was not intended for the use or purpose for which the plaintiff or his said wife had bought or ordered coal-oil, all of which was well known to the defendant; that said gasoline was a liquid of the same color and appearance as coal-oil.

9. Not knowing that the defendant had so carelessly and negligently filled the said can or receptacle with gasoline as aforesaid, and relying upon the defendant to fill the said can with coal-oil, and believing that the said can contained coal-oil, the plaintiff's wife filled the lamps in the said house of plaintiff with said gasoline, and without knowing or discovering the fact that the said fluid was not coal-oil, as had been ordered, but was gasoline, the plaintiff's said wife, on the 29th day of September, 1906, lighted one of said lamps, and, as a result thereof, the same immediately exploded, and the said house and its contents as aforesaid were set on fire and totally burned and destroyed at said time.

10. That there was no insurance upon the said house or the said contents thereof, and that the same were a total loss to plaintiff; that the said loss was wholly caused by the carelessness and negligence of defendant as aforesaid.

Wherefore, plaintiff prays judgment against the defendant in the sum of \$1,500, and costs of suit.

[Verification.]

Powers & Holland,
Attorneys for plaintiff.

FORM No. 878—By servant, for damages caused by vicious animal.

(In *Gooding v. Chutes Co.*, 155 Cal. 620; 102 Pac. 819; 23 L. R. A. (N. S.) 1071n.)

[Title of court and cause.]

Plaintiff complains of the defendant, and for cause of action alleges, that:

1. The defendant is, and at all the times hereinafter mentioned was, a corporation owning and engaged in the business of conducting a place of amusement in the city and county of San Francisco, in the state of California, known and called "The Chutes."

2. During all of said times the defendant owned and had in its possession and under its control a camel. Said camel was at all of said times of a vicious and ferocious nature and disposition, and the defendant at all of said times knew that said camel was of a vicious and ferocious nature and disposition.

3. During the month of January, 1906, the plaintiff was employed by the defendant, to look after, care for, and attend to said camel.

4. The defendant did not at any time inform the plaintiff of the vicious and ferocious nature and disposition of said camel, and previous to the attack hereinafter mentioned plaintiff did not know that said camel was of a vicious and ferocious nature and disposition.

5. On the 29th day of January, 1906, the plaintiff was ordered by the defendant to clean the stall of said camel. On said day, while the plaintiff was cleaning the said stall, the said camel, without warning of any kind, attacked plaintiff and bit plaintiff's left leg, and crushed and mangled said leg so badly that it became necessary to amputate said leg, and it was thereafter amputated.

6. By reason of the defendant's carelessness and negligence in failing to inform the plaintiff of the vicious and ferocious nature and disposition of said camel, plaintiff has lost his left leg, and as a result and consequence of the injury sustained by plaintiff as aforesaid he has undergone great and grievous bodily and mental suffering, and for the rest of his days will be incapacitated from attending to any of his ordinary business, and will continue to be deprived of the

means of earning a living. By reason of the premises plaintiff has been damaged in the sum of \$50,000.

Wherefore, the plaintiff prays that he have judgment against the defendant for the said sum of \$50,000, and costs of suit.

Carl Westerfield, and

R. D. Duke,

Attorneys for plaintiff.

[Verification.]

FORM No. 879.—To recover damages against abstractors of title for negligence in reporting upon title to real property.

(Substantial portion of pleading sustained in *Hershiser v. Ward*, 29 Nev. 228; 87 Pac. 171, 172.)

[Title of court and cause.]

Now come the plaintiffs and complain of the defendants, and for cause of action allege:

1-3. [Here follow preliminary allegations, and allegation as to the defendants being a copartnership.]

That on or about the 24th day of June, 1902, the plaintiffs employed defendants, copartners as aforesaid, for fees and a reward to them by plaintiffs paid, to examine and furnish to plaintiffs a true, accurate, full, and correct abstract of the title to that said lot, piece, or parcel of land, lying and being in the then town [now city] of Reno, in the county of Washoe, state of Nevada, bound and particularly described as follows, to wit: [Here follows description], for the purchase of which, in fee-simple, and without encumbrances, the plaintiff had theretofore contracted with one W. H. Hancock, who claimed to be the owner thereof.

4. That defendants, in the performance of the duties of such employment, did thereafter, and on or about the 25th day of June, 1902, furnish to plaintiffs a pretended abstract of title to said land, and did report and represent to plaintiffs that the same was a full, true, accurate, and correct abstract of title to said land; that by said pretended abstract of title it appeared and was shown that the said W. H. Hancock was the owner of said land and premises in fee-simple, without any encumbrances; that in reliance on said pretended abstract of title, and depending solely thereon, plaintiffs were induced to, and did, on or about the 28th day of June, 1902, purchase said land and premises from said Hancock, and did pay him therefor the sum of \$1,100 in lawful money of the United States, and, as evi-

dence thereof, plaintiffs did then and there take and receive from said Hancock a certain deed or instrument in writing, executed by said Hancock, and duly acknowledged by him, and purporting to convey from said Hancock to plaintiffs the said land and premises in fee; that said deed or instrument in writing contains the words "grant, bargain, and sell," but does not contain any other warranty or covenant whatsoever, and that plaintiffs have not, nor has either of them ever at any time, received any other warranty or covenant from said Hancock, or at all, relating to or concerning said lands or premises or the title thereto.

5. That said Hancock was not the owner of said lands or premises, or of any interest therein whatever, except a mere equitable interest as mortgagee under and by virtue of a certain indenture of mortgage, and that the Bank of Nevada, a corporation, was the owner in fee thereof; that the said state of said title appeared of record on the public records of said Washoe County, but of which plaintiffs were ignorant, they having relied upon defendants as aforesaid to inform them thereof; that defendants could, by the exercise of proper diligence and skill, have discovered said facts, but failed to discover the same, and wholly omitted and failed to exercise due care and skill in said matter and search; that defendants were therefore guilty of neglect in examining into, and in the investigation of the title of said land.

6. That the said mortgage, by and through which the said Hancock held said equitable interest as aforesaid, was given to secure, and did secure, the payment of a promissory note, dated and executed November 1, 1897, and, by its terms, was payable on demand; that the plaintiffs first discovered or learned that said Hancock was not the owner in fee of the said lands and premises, but was the holder only of said equitable interest as aforesaid, on or about the day of February, 1904, and more than six years after the date of said promissory note, and after any action to foreclose said note was barred by section 3718 of the Compiled Laws of Nevada of 1900, and when the said equitable interest which said Hancock held in and to said lands and premises as aforesaid had, without the fault of these plaintiffs or either of them, become of no value whatever.

7. That said Hancock has failed and refused, and still does fail and refuse, to pay to plaintiffs, and said plaintiffs have not received

from said Hancock, or at all, the said sum of \$1,100, nor any part thereof.

8. That by reason of said Hancock's want of title, and the fact that plaintiffs took no title by said deed, and the fact that said Bank of Nevada was the owner of said lands and premises, as aforesaid, the plaintiffs were ousted and dispossessed of said land and premises by due course of law.

Wherefore, plaintiffs pray judgment against said defendants, jointly and severally, in the sum of \$1,100, together with interest thereon at the legal rate from the 28th day of June, 1902, and for costs and disbursements of suit.

A. B., Attorney for plaintiff.

[Verification.]

- For defense of assumed risk, see ch. CV. form No. 867.
- For defense of contributory negligence, see ch. CV, forms Nos. 867 and 868.
- Form of petition in an action to recover damages for alleged malpractice of the defendant as a physician: Nelson v. Harrington, 72 Wis. 591; 40 N. W. 228, 229, 7 Am. St. Rep. 900, 1 L. R. A. 719 n.

CHAPTER CVII.

Negligence of Carriers of Property or Messages.

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§ 371. COMPLAINTS [OR PETITIONS].

FORM No. 880—Against common carrier for negligent loss of goods.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant [is a corporation, created by and under the laws of the state of , and] at the times hereinafter mentioned, was a common carrier of goods for hire, from to .

2. That on the day of , 19 , at , the plaintiff delivered to the defendant, being such corporation, certain goods [describing them], the property of the plaintiff, of the value of \$, and in consideration of the sum of \$, paid to the defendant by the plaintiff, the defendant then and there entered into an agreement with the plaintiff in writing, subscribed by the defendant [or by its agent duly authorized thereunto], a copy of which agreement is as follows: [Here copy.]

3. That the defendant did not safely carry or deliver said goods as agreed, but failed so to do, whereby the same were wholly lost to the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 881—To recover for goods injured in transit.

[Title of court and cause.]

[Introductory part.]

1-2. [Same as paragraphs 1 and 2, form No. 880.]

3. That the defendant did not safely carry said goods as so agreed, but wrongfully and negligently failed so to do; that defendant delivered said goods in a damaged condition in this [here state], whereby the same were wholly [or if partially, so state and specify] lost to the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 882—For loss of baggage.

[Title of court and cause.]

[After introductory part, and, if defendant be a corporation, so alleging:]

1. That at the times hereinafter mentioned the defendant was a common carrier of passengers and their baggage, for hire, from to .

2. That on the day of , 19 , the defendant as such common carrier, for a compensation then paid to him [it] by the plaintiff, received into his [its] train [or stage-coach, etc.] at , the plaintiff, with his baggage, to wit, [here describe,] and undertook to carry plaintiff and his said baggage from said to .

3. That said baggage was then of the value of \$.

4. That the defendant, disregarding his [its] obligation, did not use proper care in the premises, but by his [its] negligence [and that of his (its) servants] said baggage was wholly lost to the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 883—For failure to collect on delivery.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Same as paragraph 1, form No. 880.]

2. That on said day, in consideration of \$ then paid [or in consideration of a reasonable reward to be paid], the defendant agreed to carry safely for the plaintiff, and to deliver to , at , on payment by said , and not otherwise, of the sum of \$, and to pay over said sum to the plaintiff; and the plaintiff then and there delivered to the defendant for that purpose the following goods [give description], a copy of which agreement is hereto annexed, marked "Exhibit A," and made a part hereof.

3. That the defendant neglected and failed to collect said sum from said , but delivered said goods to him without receiving payment of said amount, and has not paid the same over to the plaintiff, nor has said sum or any part thereof been paid, to the plaintiff's damage in the sum of \$.

[Concluding part.]

FORM No. 884—For failure to deliver at time agreed.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Same as paragraph 1, form No. 880.]

2. That on the day of , 19 , at , the plaintiff delivered to the defendant certain goods, to wit, [describing them,] of the value of \$, the property of the plaintiff, which the defendant, in consideration of a reasonable compensation to be paid it by the plaintiff, agreed safely to carry to , and there deliver to the plaintiff, on or before the day of , 19 .

3. That the defendant did not deliver the same within that time, as agreed, but failed so to do, and did not deliver the same until the day of , 19 , whereby the plaintiff was deprived of the use of said goods for a long time, and the same were diminished in value, to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 885—Against marine carrier, for disregarding notice to keep goods dry.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at the port of , the defendant was the master and commander of a vessel known as the , then lying at said port, and the plaintiff caused to be shipped on board said vessel certain goods [describe the same], belonging to the plaintiff, and of the value of \$; that said goods were then in good order and condition; that in consideration whereof, and of the sum of \$, then and there paid by the plaintiff to the defendant, the defendant then and there promised safely to carry said goods to , and there safely deliver them to , perils of the seas only excepted, and then and there received said goods for that purpose.

2. That the plaintiff then and there caused due notice to be given to the defendant that it was necessary to the preservation of said goods that they should be kept dry.

3. That the defendant failed to care for or safely to carry said goods, but so negligently and carelessly carried the same that they became wet, and thereby entirely destroyed [or otherwise injured, as the case may be], which injury was not occasioned by reason of

any peril of the seas, but wholly through the negligence of the defendant and his servants, by reason whereof the plaintiff was damaged in the sum of \$.

[Concluding part.]

FORM No. 886—For negligence in loading cargo.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff, at defendant's request, caused to be delivered to him [describe goods] of the plaintiff of the value of \$, to be by the defendant safely and securely loaded on board a certain vessel at , for the plaintiff, for a reasonable compensation to be paid defendant therefor, and the defendant then and there received the goods for that purpose.

2. That the defendant afterwards, by himself and his servants, so carelessly and improperly conducted the loading of said goods on board the said vessel that by their negligence and improper conduct the goods were broken and injured, and a part thereof wholly destroyed, [specifying], to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 887—For loss in unloading.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. [Same as paragraph 1, form No. 885.]

2. That said vessel afterwards arrived safely at , and no [excepted perils] prevented the safe carriage or delivery of the goods.

3. That the defendant did not deliver the said goods to the plaintiff, and for lack of due care in the defendant and his servants in unloading and delivering said goods from said vessel, they were wholly lost to the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 888—For breach of contract by corporation to carry message.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. [Aver incorporation of defendant.]

2. That on the day of , 19 , at , the defendant, as a common carrier, received of the plaintiff a certain message, a copy of which is as follows: [Here set forth copy]; that said message was to be delivered in due course to at ; and that plaintiff paid to the defendant the compensation demanded therefor.

3. That defendant neglected and failed to deliver said message [or delivered said message after great delay, stating when] to the great detriment of plaintiff, and to his damage in the sum of \$.

[Concluding part.]

§ 372. ANSWERS.**FORM No. 889—Denial of contract of carriage.**

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition], as follows:

Denies that he ever undertook or agreed to carry said goods [or message] to , or to deliver the same to , and denies that said ever paid him, or agreed to pay him, any reward for such service.

[Etc.]

FORM No. 890—Denial that goods were received.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that the said ever delivered to him the said goods mentioned in the complaint [or petition], or that defendant ever received the same, or any of them.

FORM No. 891—Denial of loss and negligence.

[Title of court and cause.]

The defendant answering to the plaintiff's complaint [or petition] avers:

That he has no knowledge or information sufficient to form a belief whether said goods were lost to said , and denies that he was negligent in and about the carriage, storing, or unloading of same.

FORM No. 892—Averment that the contract was special.

[Title of court and cause.]

The defendant, answering to the plaintiff's complaint [or petition] :

Avers that the goods mentioned therein were delivered by the plaintiff to and received by the defendant upon a special contract between them, whereby it was expressly agreed and stipulated that [stating the terms].

FORM No. 893—Defense that defendant is not a common carrier.

[Title of court and cause.]

The defendant answering to the plaintiff's complaint [or petition] :

Alleges that he is not now, and was not at the time mentioned in the complaint [or petition], or at any time, a common carrier.

[Etc.]

FORM No. 894—Defense that goods were negligently packed by the plaintiff.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition] :

1. That the goods mentioned therein were of a fragile nature, liable to injury from slight cause, which the plaintiff well knew, but the defendant did not and could not reasonably be expected to know.

2. That said goods, when delivered to the defendant, were improperly packed [here state in what respect], whereas the usual and only safe way of packing such articles is [here state].

3. That by reason of such defective packing, and without the fault of the defendant, said articles were injured.

[Concluding part.]

FORM No. 895—Defense that goods were lost by unavoidable accident, etc.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition] :

1. That the merchandise mentioned therein was delivered by the plaintiff to the defendant, and by the defendant received on board the train [or steamer, etc.], under and in pursuance of a special contract made between them for the transportation of the same from to , of which the following is a copy: [Copy of contract.]

2. That while said merchandise was well and properly stowed on board the said train [or steamer, etc.], and being carried pursuant

to said contract, and without any carelessness or misconduct of the defendant or his servants, or any defect of the said train [or steamer, etc.], or its equipments, the train [or steamer, etc.], by mere casualty and accident, took fire and was consumed, with its cargo, including the merchandise of the plaintiff [or state if loss resulted from any other unavoidable cause], and thereby, by accident and casualty of fire [or otherwise, as the case may be], and not by any negligence, misconduct, or default of the defendant, the said merchandise was lost, and was not delivered.

[Concluding part.]

FORM No. 896—Defense setting forth stipulation as to value of property admitted to have been lost through negligence.

(In *Alain v. Northern Pacific R. R. Co.*, 53 Minn. 160, 54 N. W. 1072; 39 Am. St. Rep. 588; 19 L. R. A. 764.)

[Title of court and cause.]

Defendant, for answer to the petition of plaintiff, admits the delivery and receipt of the horses for transportation, their value, and their loss through its negligence, as stated in the petition, but defendant alleges that said property was delivered and received upon a special written contract, executed by both parties, containing the terms and conditions on which defendant undertook to transport property, one of which was as follows: "It is hereby stipulated that the value of the livestock to be transported does not exceed the following-mentioned sums, to wit: Each horse, \$100; each bull, \$50; each cow, \$30; such valuation being that whereon all compensation to this company for its services and risks connected with said property is based."

[Then follows averment of a tender of the amount of loss according to said valuation, the refusal to accept the same, etc.]

[Concluding part.]

FORM No. 897—Counterclaim for negligence in action by carrier to recover freight money.

[Title of court and cause.]

[After introductory part, and such other defenses as may be set forth, allege:]

The defendant, further answering said complaint [or petition], and by way of counterclaim herein alleges:

That the transportation of the goods described in said complaint

[or petition] was so negligently and carelessly conducted by the plaintiff, its servants and agents, the particulars whereof are hereinafter set forth, that said goods, and all thereof, were damaged by plaintiff in this, [here specify]; that said negligence and carelessness of the plaintiff consisted in this, [here specify the facts]; that by reason thereof said goods were wholly [or, if partially, so state and specify] lost to the defendant, to his damage in the sum of \$.

Wherefore, defendant prays that he be allowed the amount of said counterclaim as against the demand of the plaintiff herein, and furthermore that defendant be awarded his costs.

A. B., Attorney for plaintiff.

[Verification.]

For the substance of a complaint or petition in an action to recover damages for the breach of a contract for the negligent transportation of animals resulting in their emaciation, sickness, etc., from the effect of which some of the animals died, see *Chicago etc. R. Co. v. Mitchell* (Okla.), 101 Pac. 850.

Form of complaint in an action for damages occasioned, as alleged, by the gross and malicious negligence of the company to transmit and deliver a telegraphic message: *West v. Western Union Tel. Co.*, 39 Kan. 93, 94, 17 Pac. 807, 808.

Form of petition in an action for damages for loss occasioned by delay in delivering a telegram: *Martin v. Western Union Tel. Co.*, 1 Tex. Civ. App. 143, 20 S. W. 860, 861.

§ 373. ANNOTATIONS.—Negligence of carriers of property or messages.

1. Action by endorsee of bill of lading.
2. General allegation as to delay in transporting.
3. Tort and breach of contract.—Pleading in one count.
4. Liability imported by allegation that defendant is common carrier.
5. Contract not specifying shipping charges.—Construction of.
6. Storage not new contract requiring special pleading.

1. Action by endorsee of bill of lading.—Where a shipper having the right of property endorses and delivers a bill of lading, endorsee may maintain an action in his own name for goods represented by such bill of lading: *Dodge v. Meyer*, 61 Cal. 405, 417.

2. General allegation as to delay in transporting.—In the absence of a special demurrer, the plaintiff is not required to specify what is a reasonable time for transportation of goods between two points, and a general allegation of failure to transport and deliver within a reasonable time is sufficient in the absence of a specific objection thereto: *Palmer v. Atchison etc. R. Co.*, 101 Cal. 187, 189, 35 Pac. 630.

3. Tort and breach of contract.—Pleading in one count.—Two causes,—one in tort, for the breach of the common-law

obligation to transport within a reasonable time, and the other ex contractu, for a breach of the verbal contract,—may not be commingled and relied upon in the same count: *Burgher v. Wabash R. Co.*, 139 Mo. App. 62, 120 S. W. 673, 677, (for damages for breach of duty of common carrier to transport live freight).

4. Liability imported by allegation that defendant is a common carrier.—A complaint which avers that defendant is a common carrier is sufficient to impose upon defendant, if proofs be sufficient, liability as common carrier over entire route without reference to the termination of road: *Wheeler v. San Francisco etc. R. Co.*, 31 Cal. 46, 55, 89 Am. Dec. 147.

5. Contract not specifying shipping charges.—Construction of.—Where a

contract in an action brought to recover shipping charges, as declared upon, was express in respect to a promise by defendant to pay the plaintiff, but not as to the amount of the charges to be paid; held, that the averment can not fairly be held to charge that defendant agreed to pay the plaintiff whatever plaintiff might ask for freight charges, no matter how exorbitant they were, but

only to pay reasonable charges: *Chicago etc. R. Co. v. Bay Shore L. Co.*, 140 Mo. App. 52, 119 S. W. 973, 976.

6. Storage does not create a new contract requiring to be specially pleaded and distinguished from the original contract for carriage in order to recover goods or their value: *Wilson v. California C. R. Co.*, 94 Cal. 166, 170, 29 Pac. 861, 7 L. R. A. 685.

CHAPTER CVIII.

Negligence of Carriers.—Actions for Injuries to Passengers not Resulting in Death.

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§ 374. CODE PROVISIONS.

Damages for failure to transport and deliver.

California, § 482. In case of refusal by such corporation or their agents so to take and transport any passengers or property, or to deliver the same, at the regular appointed places, such corporation must pay to the party aggrieved all damages which are sustained thereby, with costs of suit. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Arizona, Rev. Stats. 1901, § 876. b Arkansas, Dig. of Stats. 1904 (Kirby), § 6593. Idaho, Rev. Codes 1909, § 2811. Montana, Rev. Codes 1907, § 4325. • Nebraska, Comp. Stats. Ann. 1909, § 2080; Ann. Stats. (Cobbey), § 10598. Nevada, Comp. Laws Ann. 1900 (Cutting), § 1017. • New Mexico, Comp. Laws 1897, § 3863. • North Dakota, Rev. Codes 1905, § 4289. • Oklahoma, Rev. and

Ann. Stats. 1903 (Wilson), § 1049; Comp. Laws 1909 (Snyder), § 1379. * South Dakota, Rev. Codes 1903, C. C. § 521. † Texas, Civ. Stats. 1897 (Sayles), Art. 4496. ‡ Utah, Comp. Laws 1907, § 449.

* Arizona, § 876. In case said corporation shall refuse to transport persons or property as provided in the preceding section, or leave the same at place at destination, it shall pay to the party aggrieved all damages he or she shall sustain thereby.

† Arkansas, § 6593, substantially same as Cal. Civ. Code § 482, except in line 3 after "appointed" change "places" to "time."

‡ Nebraska, § 2080, substantially same as Cal. Civ. Code § 482, except in line 3 after "same" change the next passage to read "or either of them, under the laws, rules, and usages the [that] regulate common carriers," before "such corporation."

§ New Mexico, § 3863, substantially same as Arizona, § 876.

* North Dakota, § 4289. In case of the refusal by such corporation or its agents to take or transport any passenger or property as provided in the preceding section, or in case of the neglect or refusal of such corporation or its agents to discharge or deliver passengers or property at the regularly appointed place under the laws which regulate common carriers, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby with costs of action.

† Oklahoma, § 1049, same as North Dakota § 4289.

‡ South Dakota, Civ. Code § 521, same as North Dakota § 4289.

§ Texas, Art. 4496. In case of the refusal by such corporation or their agents

so to take and transport any passenger or property, or to deliver the same, or either of them, at the regular[ly] appointed time, such corporation shall pay to the party aggrieved all damages which shall be sustained thereby, with costs of suit, and in case of the transportation of property shall in addition pay to such party special damages at the rate of five per cent per month upon the value of the same at the time of shipment, for the negligent detention thereof beyond the time reasonably necessary for its transportation; provided, that in all suits against such corporation under this law the burden of proof shall be on such corporation to show that the delay was not negligent.

‡ Utah, § 449. Every railroad company shall furnish sufficient accommodations for the transportation of all passengers and property as shall, within a reasonable time previous to the departure of any train, offer or be offered for transportation at any station, siding, or stopping place established for receiving and discharging passengers and freight, and at any railroad junction; and shall take, transport, and discharge such passengers and property at, from, and to such places, on the due payment of tolls, freight, or fare therefor; and if the company or its agents shall refuse to take and transport any passenger or property, or to deliver the same at the regularly appointed places, it shall be liable to the party aggrieved for all accruing damages, including costs of suit.

Duty to furnish accommodations.

California, § 483. Every railroad corporation must furnish, on the inside of the passenger cars, sufficient room and accommodations for all passengers to whom tickets are sold for any one trip and for all persons presenting tickets entitling them to travel thereon; and when fare is taken for transporting passengers on any baggage, wood, gravel, or freight car, the same care must be taken and the same responsibility is assumed by the corporation as for passengers on passenger cars. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Idaho, Rev. Codes 1909, § 2812. ^a Missouri, Ann. Stats. 1906, § 1080. Montana, Rev. Codes 1907, § 4326. ^b North Dakota, Rev. Codes 1905, § 4291. ^c Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 1051; Comp. Laws 1909 (Snyder), § 1381. ^d South Dakota, Rev. Codes 1903, C. C. § 523. ^e Utah, Comp. Laws 1907, §§ 449, 450.

^a Missouri, § 1080. In case any passenger on any railroad shall be injured while on the platform of a car, or in any baggage, wood or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train, such company shall not be liable for the injury: Provided, said company, at the time, furnished room inside its passenger cars sufficient for the proper accommodation of the passengers.

^b North Dakota, § 4291, substantially same as last clause of Cal. Civ. Code § 483.

^c Oklahoma, § 1051, substantially same as last clause of Cal. Civ. Code § 483.

^d South Dakota, Civ. Code § 523, substantially same as last clause of Cal. Civ. Code § 483.

^{e1} Utah, § 449, see note 1 to Cal. Civ. Code § 482.

^{e2} Utah, § 450. In case any passenger shall be injured on the platform of any car or on any baggage, wood, gravel, or freight car, in violation of the printed regulations of the company, posted up at the time in a conspicuous place inside of its passenger cars then in the train or in violation of verbal instruction given by any officer of the train or company, such company shall not be liable for the said injury; provided, said company at the time furnished room inside its passenger cars sufficient for the accommodation of the passengers.

Eviction of passenger refusing fare.

California, § 487. If any passenger refuses to pay his fare, or to exhibit or surrender his ticket, when reasonably requested so to do, the conductor and employees of the corporation may put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling-house, on stopping the train. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Arkansas, Dig. of Stats. 1904 (Kirby), § 6591. Idaho, Rev. Codes 1909, § 2822. ^b Missouri, Ann. Stats. 1906, § 1074. Montana, Rev. Codes 1907, § 4328. ^c Nebraska, Comp. Stats. Ann. 1909, § 2065; Ann. Stats. (Cobbey), § 10624. ^d Nevada, Comp. Laws Ann. 1900 (Cutting), § 1019. ^e New Mexico, Comp. Laws 1897, § 3847. ^f North Dakota, Rev. Codes 1905, § 5688. ^g Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 1062; Comp. Laws 1909 (Snyder), § 1394. ^h South Dakota, Rev. Codes 1903, C. C. §§ 545, 1593. ⁱ Utah, Comp. Laws 1907, § 451. ^j Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 1818.

^a Arkansas, § 6591. If any passenger shall refuse to pay his fare or toll, it shall be lawful for the conductor of the train and the servants of the corpora-

tion to put him out of the cars at any usual stopping place the conductor shall select.

^b Missouri, § 1074. If any passenger

shall refuse to pay his fare, or shall behave in an offensive manner, or be guilty of repeated violations of the rules of the company, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any usual stopping place, or near any dwelling-house, as the conductors shall elect, on stopping the train.

c Nebraska, § 2065. If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars, using no unnecessary force, at any place within five miles of any station.

d Nevada, § 1019, substantially same as Arkansas § 6591, except in line 2, after "toll," insert "upon demand"; also in line 6, after "any" omit "usual" before "stopping."

e New Mexico, § 3847. In addition to the foregoing, every corporation formed under this act shall have the following powers:

• • • Thirteenth. To expel from its cars at any stopping place, using no more force than may be necessary, any passenger who, upon demand, shall refuse to pay his fare, or shall behave in a rude, riotous or disorderly manner toward other passengers, or the employees of such corporations in charge of such cars or, upon his attention being called thereto, shall persist in violating the rules of the corporation against gambling upon its cars.

f North Dakota, § 5688. A passenger who refuses to pay his fare or to conform to any lawful regulation of the carrier may be ejected from the vehicle by the carrier. But this must be done with as little violence as possible and at any usual stopping place or near some dwelling-house. After having ejected the passenger a carrier has no right to require the payment of any part of his fare.

g Oklahoma, § 1062, substantially same as North Dakota § 5688.

h1 South Dakota, C. C. § 545. If any passenger shall refuse to pay his fare, it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage out of the cars in the manner prescribed in section 1593.

h2 South Dakota, § 1593, same as North Dakota § 5688.

i Utah, § 451, substantially same as Cal. Civ. Code § 487, except in line 2, omit "reasonably" before "requested"; also after "so to do" in the same line insert "or if he behaves in a disorderly manner" before "the conductor"; also in the line next to the last change "near" to "in sight of" before "any dwelling."

j Wisconsin, § 1818. If any passenger shall refuse to pay his fare it shall be lawful for the conductor of the train and the servants of the corporation to put him and his baggage off the cars, on stopping the cars and using no unnecessary force, at any usual stopping place or near any dwelling-house, as the conductor shall elect.

Regulations as to fares, etc.

California, § 501. The rates of fare on the cars must not exceed ten cents for one fare for any distance under three miles, and in municipal corporations of the first class must not exceed five cents for each passenger per trip of any distance in one direction either going or coming, along any part of the whole length of the road or its connections. The cars must be of the most approved construction for the comfort and convenience of passengers, and provided with brakes to stop the same, when required.

A violation of the provisions of this section subjects the corporation to a fine of one hundred dollars for each offense. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Hawaii, Rev. Laws 1905, § 843. **b** Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 2096.

a Hawaii, § 843. 1. Any person riding upon the cars of said railway shall be liable to pay for such transportation the following rates: For a continuous ride anywhere between Diamond Head and Moanalua, or Makai of a line drawn parallel to the sea coast, and one and a half miles distant therefrom, not to exceed five cents, provided that children under seventeen years of age in going to and from school, shall not be required to pay over half fares, for which purpose tickets shall be issued. * * *

3. Upon a continuous trip, persons riding upon the cars, and transferring from one car to another upon a connecting line within the limits above mentioned, shall be entitled to a transfer ticket

without the payment of an extra fare upon the lines of this railway. * * *

b Oregon, § 2096. That it shall be unlawful for any person, company, or corporation, owning or operating a line or lines of street railway within the corporate limits of any city in the state of Oregon having a population of over fifty thousand inhabitants, to charge a rate of fare to any passenger exceeding the sum of five cents for any one continuous trip in any one general direction between any two points on the street railway line of such person, company, or corporation within the corporate limits of such city. Any violation of this section shall be punished by a fine of not less than fifty dollars nor more than one hundred dollars.

§ 375. COMPLAINTS [OR PETITIONS].

FORM No. 898—Against street railway corporation for damages for personal injuries sustained by passenger through negligent and careless starting of car.

(In *Renfro v. Fresno City R. Co.*, 2 Cal. App. 317; 84 Pac. 357.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That defendant is, and at all the times named in this complaint was, a corporation duly incorporated and doing business under the laws of the state of California, and during all of said time was and is the owner of and operating certain street railways on and along certain public streets in the city of Fresno, in the county of Fresno, and state of California, including a certain railway running over and along that certain street in said city known as Blackstone Avenue, extending along said Blackstone Avenue to a point at or near the intersection of said Blackstone Avenue with the south line of Belmont Avenue; that defendant is the owner of the track, rolling-stock, and other appliances thereto belonging, and was at the time herein mentioned, and it still is, a common carrier of passengers for hire over its said street railways.

2. That on or about the 4th day of February, 1904, the defendant, in consideration of the sum of five cents then paid to it by plaintiff therefor, undertook and agreed as such common carrier to transport and convey the plaintiff over its said railroad along Blackstone Avenue to the terminus of said railroad, at or near the south line of Belmont Avenue, as a passenger, and plaintiff thereupon entered one of the cars of said defendant to be so conveyed.

3. That while plaintiff was as such passenger on said car, and being so conveyed thereon, and while in the act of getting out of and from said car, and being still thereon, to wit, on the platform and steps thereof, and at the terminus of said railroad near Belmont Avenue as aforesaid, and at the place where said car usually stopped for passengers to alight therefrom, and while said car had slowed up for the purpose of permitting passengers to get off from said car, the employees of said defendant who were then and there running said car, and had the same under their charge and control, negligently and carelessly caused said car to be suddenly and violently jerked and started and put in rapid motion without allowing plaintiff sufficient time to alight therefrom; that in consequence of said negligent and careless action of said defendant's employees, and without any fault or negligence on the part of plaintiff, and as a further consequence of the negligence and carelessness of defendant's said employees in running and conducting said car, plaintiff was violently thrown from said car to the ground and thereby sustained the following described injuries, to wit: He was greatly injured, bruised and crippled in his body and right leg, and the femur, commonly known as the thigh-bone, was fractured, by reason whereof plaintiff has been unable to bear but little weight upon his right leg, and has been unable to walk except with the aid of crutches, and by reason whereof plaintiff was made sick and confined to his house for a long time, and has suffered, and does suffer, great bodily pain and mental anguish, and has been unable to do any work or to attend to any business since said 4th day of February, 1904. Plaintiff is informed and believes, and upon such information and belief alleges, that his injuries are of a permanent character, and on account thereof plaintiff is and will be incapacitated permanently from working at his trade and business or earning a livelihood; that plaintiff is a bricklayer by trade, and before receiving said injuries was able to and did secure continuous employment at his trade, and received therefor the sum of \$6 per day; that were it

not for said injuries plaintiff would now be able to earn said sum of \$6 per day; that plaintiff has been thereby damaged in the sum of \$726; that plaintiff was made sick on account of said injuries, and was compelled to and did employ physicians to attend to him in his said sickness, and has become obligated to said physicians for their services in the additional sum of \$25.

4. That plaintiff has been and is damaged, on account of said injuries so received by him, in all, in the sum of \$10,000.

Wherefore, plaintiff prays judgment against said defendant for the sum of \$10,000 damages, and for costs of suit.

Harris & Perkins,

[Verification.]

Attorneys for plaintiff.

FORM No. 899—Against common carrier, for personal injuries resulting from wrongful ejection of passenger from street-car.

(In *Braly v. Fresno City R. Co.*, 9 Cal. App. 417; 99 Pac. 400.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1-4. [After the usual averments as to the incorporation of defendant company, its ownership and operation of street-car lines, designating them; that defendant was and is a common carrier for hire; that plaintiff boarded one of defendant's cars and paid his fare, and was a passenger thereon, etc., the complaint proceeds:] That after said car had started along Stanislaus Street fare was again demanded by the conductor thereof from the plaintiff, * * * which plaintiff refused to pay, and told him that if he would stop the car he would disembark; that thereupon the conductor took hold of the plaintiff in a violent and disagreeable manner, and began to scuffle with and otherwise injure and mistreat the plaintiff, and solely and only as a result thereof, and of the manner in which plaintiff was maltreated, abused, and handled by the conductor of said car, the agent and representative of said defendant, plaintiff was violently thrown from said car while the same was rapidly moving, and at a speed, as plaintiff is informed and believes, of about fifteen miles an hour or more, and landed upon the ground upon his left side, striking his shoulder and head, and thereby sustained great injury and damage, to wit: he was greatly injured, bruised, and crippled in his left shoulder and arm, and upon his head and face; that his left arm was broken and shoulder crushed, and he was permanently injured

and crippled, in this, that he thereby permanently lost the use of his left arm and hand; that plaintiff has been required to pay, and has paid, large sums of money to doctors, physicians, and surgeons in the care and treatment of the injuries so occasioned, and also hospital and other expenses necessarily incurred because of said injury, said sums amounting, in the aggregate, to the sum of \$250; that, furthermore, plaintiff has been and is damaged on account of the injuries so received by him in the sum of \$10,000.

Wherefore, plaintiff prays for judgment against the defendant for the sum of \$10,250, and for his costs of suit.

L. L. Cory, and
M. K. Harris,

[Verification.]

Attorneys for plaintiff.

FORM No. 900—For damages for forcible ejection from train.

(In *Wieland v. Southern Pacific Co.*, 1 Cal. App. 343; 82 Pac. 226.)

[Title of court and cause.]

Plaintiff complains of the defendant, and for cause of action alleges:

1. That the defendant is now, and at all the times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the state of Kentucky; and at all times herein mentioned was engaged in the business of a common carrier of passengers for hire between the places of its line of railroad hereinafter mentioned.

2. That on or about the 18th day of June, 1902, plaintiff was desirous of being conveyed from the city of Fresno, county of Fresno, state of California, to the station of Rolinda, in said county and state, upon one of defendant's railroad trains, and on or about said day and at and in the city of Fresno, and for the purpose aforesaid, plaintiff got aboard one of defendant's railroad trains; that the train which plaintiff got aboard as aforesaid, and in which he desired to be conveyed to said station of Rolinda, was at the date aforesaid, and had been for a long time prior thereto, regularly used and employed by defendant for the purpose, among other things, of carrying passengers for hire from said city of Fresno to said station of Rolinda, and, in pursuance of said purpose, the rules and regulations of said defendant permitted said train to stop at said station of Rolinda.

3. That soon after leaving said city of Fresno on said train, plaintiff, in conformity with the rules of defendant, paid to one of the agents of defendant, to wit, the conductor of said train, the full amount of fare regularly charged by said defendant as hire for conveying a passenger from said city of Fresno to said station of Rolinda; that said fare was duly and without protest accepted by said conductor and said fare was not, nor was any part thereof, ever returned to plaintiff.

4. That thereafter, and before reaching said station of Rolinda, and at an unusual stopping-place on the line of defendant's railroad, and far from any dwelling-house, the conductor of said train forcibly, oppressively, and maliciously, and with great force, violence, and rudeness, expelled and ejected plaintiff from said train, and refused plaintiff the privilege of riding on said train the remainder of the distance to said station of Rolinda; that at the time of being expelled from said train plaintiff was suffering from a serious illness, and was able to walk only with great pain and difficulty, of all of which he fully informed said conductor; that on being ejected from said train with great force and violence as aforesaid plaintiff was seriously maimed and injured, and was further weakened and rendered unable to walk; that at the time plaintiff was ejected and expelled from said train it was already late in the evening, to wit, about seven o'clock or thereabouts, and soon thereafter became dark, by reason of all of which it was impossible for plaintiff to reach a place where he could receive food or shelter or comfort; * * * that in consequence of the facts set forth plaintiff was compelled to lie during the whole of the night following his expulsion from said train in an open field at or near the point where he was expelled from said train, and was without food or shelter or medicines, and suffered great pain and mental anguish; that on the morning following plaintiff was so weakened and ill and exhausted that it was impossible for him to walk or secure means of conveyance from said place, and he was compelled to lie at or near said place during the entire day following without food or shelter or comfort or medicine, to his great and permanent injury and damage.

5. That by reason of defendant's negligence as aforesaid, as in the paragraph above set forth, plaintiff was seriously and permanently injured, and suffered, and still suffers, great physical pain and great mental distress and anguish, and became and continued to be sore,

maimed, and crippled; that he has been, and will continue to be, incapacitated and prevented from carrying on his usual occupation, which was that of a laborer, and from which he was earning prior to said injury \$30 per month; that he has necessarily expended the sum of \$50 for medical treatment as the result of said injury, all to the great and permanent damage of plaintiff in the sum of \$10,000.

Wherefore, plaintiff prays judgment against defendant for the sum of \$10,000, and for costs of suit.

Henry Brickley, and
George Cosgrave,
Attorneys for plaintiff.

[Verification.]

FORM No. 901—For personal injuries suffered by wife.—Joining of husband in the action.

(In Choctaw etc. R. Co. v. Burgess, 21 Okla. 653; 97 Pac. 271.)¹

[Title of court and cause.]

Comes now the plaintiffs, Myra Burgess and W. N. Burgess, her husband, and state:

1. That plaintiffs are wife and husband, and both are citizens of the United States, residing in the southern district of the Indian Territory; that the defendant, the Choctaw, Oklahoma, and Gulf Railroad Company, is a corporation duly organized, existing, and doing business in the Indian Territory under and by virtue of the laws in force in said territory, and as such is authorized and empowered to sue and be sued in its corporate name.

2. That defendant company now is, and continuously during all the dates herein mentioned has been, the owner of, and operating, a railroad in and through the Indian Territory, and in and between the town of Ardmore, in the southern district, and the town of Haileyville, in the central district of said territory, and in, through, and between the town of Provençe and the town of Mannsville, in said southern district of the Indian Territory, and at said towns has and maintains depots and stations, and on said railroad runs and

¹ With reference to the joining of the husband in the action of Choctaw etc. R. Co. v. Burgess, *supra*, the court held that it was not necessary to construe the statute providing "that where a married woman is a party, her husband must be joined with her, except in the following cases: * * * she may maintain an action in her own name * * * for damages against any person or body corporate for any injury to her person, character, or property": *Mansf. Dig. Ark.* 1834, § 4951, extended by act of Congress to the Indian Territory (*Ann. Stats.* 1889, § 3156).

operates engines and cars for the accommodation and transportation of passengers and freight, and was during all said times, and now is a common carrier of passengers for hire.

3. That heretofore, to wit, on the 1st day of December, 1903, the plaintiff Myra Burgess went to the depot and station of defendant company at the town of Provence, and went aboard the passenger cars of defendant at said station, and became a passenger of defendant company, for the purpose of being carried and transported from said town of Provence to the said town of Mannsville.

4. That on said date defendant was running and operating an engine and cars, constituting the passenger train, on said line of railroad between the said town of Provence and the town of Mannsville; that defendant company, by and through its agents and employees, stopped said train at said town of Provence, and plaintiff Myra Burgess attempted to board said train; that at the time she was aboard said train, and had gotten on the steps of one of said cars, the defendant company, by and through its agents, servants, and employees in charge of said train, carelessly and negligently, and without regard to the safety of plaintiff Myra Burgess, started and moved said train in a quick, rapid, careless, and negligent manner, and thereby threw her forcibly and violently upon and against an iron railing upon said car, and upon and against other parts of said car, and thereby severely bruised her left arm above the elbow, bruised and wounded and injured her on the right side of the bowels and just above the pelvis bone, and in her head, back, bowels, organs of generation, and other parts of her body; that at the time of the infliction of said injuries as aforesaid the plaintiff Myra Burgess was pregnant, [and by reason of said injuries she has been constantly threatened with miscarriage,]² and has at all times been under the care of a physician; that, by reason of the careless and negligent infliction of said injuries as aforesaid, the plaintiff Myra Burgess received a great shock to her nervous system such as has impaired and will permanently impair her general health, that will shorten her life, and, together with said injuries, will cause her life to be one of continued suffering and pain.

² A demurrer to the complaint in *Choctaw etc. Co. v. Burgess*, supra, shown in form No. 901, was sustained as to the allegation contained in said complaint that the plaintiff was threatened with miscarriage as a result of the injuries sustained, but in all other respects the demurrer was overruled, and judgment for the plaintiff was finally affirmed.

That by reason of such injuries so produced the plaintiff Myra Burgess has constantly and continually and ever since suffered and endured great mental injury and agony.

That since the infliction of said injuries as aforesaid, plaintiffs have been compelled to expend for medicines and care of a physician for plaintiff Myra Burgess the sum of \$300; that by reason of the foregoing facts plaintiffs allege that the plaintiff Myra Burgess has been damaged in the sum of \$25,000.

[Prayer.]

[Verification.]

Cruce & Bleakmore,
Attorneys for plaintiffs.

FORM No. 902—By passenger, for damages caused by negligent operation of an elevator.

(In *Cragg v. Los Angeles Trust Co.*, 154 Cal. 663; 98 Pac. 1063.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That defendant is a corporation duly organized and existing under the laws of the state of California, and at all times herein mentioned was, and now is, the owner of, and in possession of and occupying, the building hereinafter mentioned, and as a part of the use of said building operated the elevator therein, hereinafter mentioned.

2. That on the 26th day of October, 1906, plaintiff was in the employ of defendant, and it was his duty in the service of the defendant to remove a galvanized iron barrel or can from the second floor of said building to the ground floor; that said building is a seven-story building, on the corner of Second and Spring streets in the city of Los Angeles, county of Los Angeles, state of California; that in the performance of said duty it was necessary that the plaintiff should, and he was obliged to, enter the elevator operated by defendant in said building and place therein said barrel or can; that on said 26th day of October, 1906, about half-past 7 o'clock in the morning, as plaintiff entered said elevator to place therein said barrel or can, defendant negligently allowed and caused said elevator suddenly and unexpectedly to be abruptly or improperly started in such a manner as to, and defendant did thereby, precipitate plaintiff against the wall of the shaft in which said elevator ascended and descended, and crushed plaintiff between said elevator car and wall, breaking his jawbone, disfiguring his face, and otherwise injuring him.

3. That because of such injuries plaintiff has been compelled to employ a doctor at an expense, up to this time, of \$72, and has paid more than \$20 for medicines, bandages, and dressing for his wounded face, and \$16 for a nurse; that plaintiff was further thereby rendered and made unable to pursue his usual or any vocation up to this time, to his loss in the sum of \$75, all of which was rendered necessary and occasioned by said negligence of defendant.

4. That by reason of said negligent crushing, bruising, and disfiguring of plaintiff by defendant plaintiff has been further damaged in the additional sum of \$2,000.

Wherefore, plaintiff prays judgment against defendant for the sum of \$2,187, and for costs of suit.

[Verification.]

Wellborn & Wellborn,
Attorneys for plaintiff.

Form of complaint in an action to recover damages for injuries to plaintiff's person, caused by the falling of an hydraulic elevator operated by defendants in their store: *Treadwell v. Whittier*, 80 Cal. 574, 576, 22 Pac. 266, 13 Am. St. Rep. 175, 5 L. R. A. 498.

Form of complaint in an action to recover damages for mistreatment while a passenger on a boat: *Mace v. Reed*, 89 Wis. 440, 441, 62 N. W. 186, 187.

§ 376. ANNOTATIONS.—Negligence of carriers.—Actions for injuries to passengers not resulting in death.

1. Nature of action against carrier.
2. Action ex delicto.—Pleading contract as matter of inducement.
3. General negligence.—Averment of.
- 4, 5. Action for wrongful expulsion.—What action will be.
6. Averment as to payment or tender of fare.
7. Complaint charging gross negligence.
8. Instruction as to damages for mental suffering, etc.
9. Alleging cause of derailment of car not required.
10. Proof of derailment of car.
11. Motion for nonsuit.—Statement of grounds.

1. Nature of action against carrier.—An action against a carrier for breach of contract may be for the breach or in tort for a violation of duty as common carrier: *Sloane v. Southern California R. Co.*, 111 Cal. 668, 677, 44 Pac. 320, 32 L. R. A. 193. See *Jones v. Steamship Cortes*, 17 Cal. 487, 79 Am. Dec. 142.

2. Action ex delicto.—Pleading contract as matter of inducement.—When an action against a carrier sounds in tort, the allegation of the contract of carriage is regarded as mere inducement to the action to show the plaintiff's right to sue as a passenger. Therefore, in cases of this class, where the plaintiff

alleges the payment of his fare and the promise of the company to carry him, and then proceeds to state the tort, and his claim for damages arising on account thereof, the action is declared to be one in tort, for the reason that the gravamen or gist of the action proceeds ex delicto on the breach of the duty owing to the public imposed by law: *Canady v. United R. Co.*, 134 Mo. App. 232, 114 S. W. 88, 90; *Denver etc. R. Co. v. Cloud*, 6 Colo. App. 445, 40 Pac. 779; *Head v. Georgia etc. R. Co.*, 79 Ga. 358, 7 S. E. 217, 11 Am. St. Rep. 434; *Ames v. United R. Co.*, 117 Mass. 541, 19 Am. Rep. 426; *Hammond v. Railway Co.*, 6 S. C. 120,

137, 24 Am. Rep. 467; *Brown v. Railroad Co.*, 54 Wis. 342, 347, 11 N. W. 356, 911, 41 Am. Rep. 41.

3. General negligence.—Averment of.—The following is an example of an averment of general negligence: "The defendant carelessly and negligently caused and permitted the train on which plaintiff was riding as a passenger to come in violent collision with another train of defendant's, said other train being on said

Street, and on said incline as aforesaid; that said collision was occasioned without any fault on the part of the plaintiff, but by reason of the negligence as aforesaid of the defendant": *Price v. Metropolitan S. R. Co.*, 220 Mo. 435, 119 S. W. 932, 937, 132 Am. St. Rep. 588.

4. An action for wrongful expulsion with force and violence is in effect an action for tort for breach of duty: *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 6, 31 Pac. 1112, 33 Am. St. Rep. 157. See *Pittsburgh etc. R. Co. v. Reynolds*, 55 Ohio St. 370, 45 N. E. 712; 60 Am. St. Rep. 706; *Northern Pacific R. Co. v. Pauson*, 70 Fed. 585, 17 C. C. A. 287, 30 L. R. A. 730.

5. Action in tort or on the case will lie to recover damages for wrongful expulsion: *Gorman v. Southern Pacific Co.*, 97 Cal. 1, 6, 31 Pac. 1112, 33 Am. St. Rep. 157.

6. Averment as to payment or tender of fare.—It is not necessary that the plaintiff allege strictly a legal tender of fare; it is sufficient to allege that he was ready and willing and offered to pay the defendant such sum of money as it was legally entitled to charge. Whenever performance of a duty or obligation is cast upon one party in consequence of the contemporaneous act of payment by the other, it is sufficient if the latter is ready and willing to pay when the former is ready to undertake the duty: *Tarbell v. Central Pacific R. Co.*, 34 Cal. 616, 622. See *White v. Chesapeake R. Co.*, 26 W. Va. 800, 805, and note 77 Am. Dec. 474.

7. Complaint charging gross negligence should set forth by averments that the act or omission causing the injury complained of had been wanton, or wilful: *Gould v. Merrill R. & L. Co.*, 139 Wis. 432, 121 N. W. 161, 164, (obiter).

8. Instruction as to damages for mental suffering, etc.—Where the defendant is fairly advised by the allegations

of the pleading that a recovery would be sought for mental and physical suffering of a wife resulting in being carried beyond their station while with her husband as a passenger on a train, and where no exception to the petition for more specific allegations was presented to the court, it can not be said that the court erred in instructing the jury, in effect, that damages, if any, were recoverable for mental and physical suffering of the wife caused by the walk back to her station: *St. Louis etc. R. Co. v. Franks* (Tex. Civ. App.), 114 S. W. 874, 876.

9. Alleging cause of derailment of car not required.—No duty rests upon a plaintiff who was a passenger to allege or prove in his affirmative case the particular cause of a derailment in which he was injured, and where such allegations appear, they are treated as surplusage. He may rely upon his prima facie case without attempting to substantiate them: *Hoskins v. Northern Pacific R. Co.*, 39 Mont. 394, 102 Pac. 983, 990, overruling views in conflict with this expression in *Pierce v. Great Falls etc. R. Co.*, 22 Mont. 446, 56 Pac. 867.

10. Proof of derailment of a car, in consequence of which a passenger therein was injured, is ordinarily prima facie evidence of negligence on the part of the common carrier. For this reason no necessity exists for the passenger to allege the particular cause of the derailment: *Hoskins v. Northern Pacific R. Co.*, 39 Mont. 394, 102 Pac. 988, 990.

11. Motion for nonsuit.—Statement of grounds.—In an action against a railroad corporation for alleged negligence and lack of care in allowing its railroad tracks to become out of repair, the unsafe condition of which was alleged to have caused the accident in which the plaintiff was injured, the motion for nonsuit thereon was granted and judgment on appeal affirmed. The grounds of the motion were stated as follows: "On the ground that there is nothing in the derailment of a train that creates a presumption of negligence in the case of this defendant; that there is no proof that plaintiff was a passenger; that there has been no proof of the allegations of excessive speed, or negligence in respect to defective rails, and no proof of any of the particular [averments of] negligence alleged in the complaint,

and no proof that the defendant com-
pany had allowed its track to become
out of repair or in an unsafe condition,
and also upon the ground that the mere
running at a speed in excess of the

schedule time is not any evidence of
negligence": Hoskins v. Northern Pa-
cific R. Co., 39 Mont. 394, 102 Pac. 988,
990.

CHAPTER CIX.

Death by Wrongful Act.

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§ 377. COMPLAINTS [OR PETITIONS].

FORM No. 903—Against common carrier by representative of a decedent,
for damages for wrongful death.—Decedent a passenger on
defendant's train.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. [If the defendant is a corporation common carrier, allege:]
That the defendant was at the times hereinafter mentioned and is a
corporation created by and under the laws of this state, and was and
is a common carrier of persons and property for hire, between the
places hereinafter mentioned, and was the owner and in possession of
the cars, train of cars, and railroad tracks hereinafter mentioned,
and during all said times was, and it still is, engaged in operating
said cars and trains over said tracks.

2. That on the day of , 19 , by the order of the court of the county of , in the state aforesaid, duly given and made, the plaintiff, , was appointed executor [or administrator] of the estate of L. M., deceased, and letters testamentary [or of administration] on said estate were ordered to issue to plaintiff upon qualifying; that the plaintiff thereafter duly qualified as such executor [or administrator], and thereupon letters testamentary [or of administration] were issued to plaintiff on the day of , 19 , and plaintiff is now, and ever since has been, the duly qualified and acting executor [or administrator] of the estate of said L. M., deceased.

3. That on the day of , 19 , the defendant, in consideration of the sum of \$, paid as fare by said L. M., received the said L. M. as a passenger on said railroad from to .

4. That on said last-named day [or state when], and while said L. M. was on the cars on the said journey, at , and in this state, the car in which L. M. was passenger, by the negligence of the defendant and its servants, was thrown from the track, and said L. M. was, without fault on his part, thereupon and thereby immediately killed.

5. That said L. M. left him surviving, as his only heirs, E. M., his widow, and F. M., his daughter, a child of years, and G. M., his son, a child of years, [etc.] his only children, and next of kin, all of whom were dependent upon him for support; that said children were also dependent upon the said L. M. for nurture and education; that thereby said E. M., F. M., and G. M., [etc.,] have been injured by the death of L. M. in the amount of \$.

Wherefore, the plaintiff, as such administrator [or executor], asks judgment in said amount of \$, and for such other relief as may be proper, and for costs.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 904—By representative, for wrongful death caused by collision.

[Title of court and cause.]

1-3. [Same as in preceding form.]

4. That the defendant and its servants and employees so negligently and unskillfully conducted itself and themselves in the management of said train of cars, and in not keeping the track of said

railroad clear of other cars [or state such other acts of defendant as may have caused the injury complained of], that said train, while proceeding from to , was violently run into by and collided with another train running [or standing] on said track, thereby causing the car in which said [decedent] was traveling to become wrecked [or allege other facts, describing how said train was wrecked or thrown from the tracks, as the case may be], and the said [naming decedent] was thereby fatally injured, his death resulting immediately therefrom [or state when death so resulted].

5. [Same as paragraph 5 in preceding form.]
[Concluding part.]

FORM No. 905—By heir at law against street railway corporation, for damages resulting from the death of a minor child caused by negligent operation of street-cars.

(In *Schneider v. Market Street R. Co.*, 134 Cal. 482; 66 Pac. 734.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That she is the mother of Carl Richard Schneider, hereinafter mentioned, and his only surviving heir at law.

2. That at all the times herein mentioned defendant was, and now is, a corporation duly organized under the laws of the state of California, with its principal place of business at the city and county of San Francisco, state of California.

3. That at all the times hereinafter mentioned the defendant was the owner, and in the possession of, and employed in, the management and operation of certain street railroads in the city and county of San Francisco, together with the cars, rolling-stock, and appurtenances thereof.

4. That upon the 9th day of December, 1898, defendant was operating its system of street railroads upon East Street, in said city and county, and was engaged in running street-cars over and upon said street.

5. That upon the said 9th day of December, 1898, at about the hour at 6:30 o'clock P. M., Carl Richard Schneider was crossing East Street where the same intersects with Pacific Street, in said city and county.

6. That while said Carl Richard Schneider was crossing East Street aforesaid where the same intersects with Pacific Street, a car

of said defendant, The Market Street Railway Company, in charge of its agents, servants, and employees, crossed Pacific Street where it intersects with East Street, going towards the north along East Street at a high rate of speed, to wit, in excess of eight miles per hour, and, without ringing a bell or sounding a gong, or without any other warning or any warning, violently struck said Carl Richard Schneider in the head, fracturing his skull and killing him instantly.

7. That in crossing East Street where the same intersects with Pacific Street, in said city and county of San Francisco, the defendant and the persons in charge of said car, to wit, the conductor and motorman, permitted said car to approach said street-crossing within a distance of twenty-five feet and less, without ringing a bell or sounding a gong, nor was any such bell or gong rung or sounded at all while said car was approaching or passing over said street-crossing.

8. That at all the times herein mentioned there was in full force and effect in said city and county of San Francisco a certain ordinance, duly and regularly adopted and passed by the board of supervisors thereof, and in full force and effect on and after November 11, 1882, and known as order No. 1694 of the board of supervisors of the city and county of San Francisco, by which said order it was ordained that "It shall be unlawful for the engineer, driver, conductor, or person in charge of any street-car, train of street-cars, grip-car, or dummy, propelled by means of wire ropes attached to stationary steam-engines or a locomotive engine, or by electric motor, to permit said street-car, train of street-cars, grip-car, or dummy, to approach a street crossing in said city and county within a distance of twenty-five feet without ringing a bell or sounding a gong, which bell or gong must be rung or sounded until said street-car, train of street-cars, grip-car, or dummy car, shall have passed over said street-crossing."

9. That the death of said Carl Richard Schneider resulted directly and proximately from the gross and reckless negligence of defendant, and its agents, servants, and employees in charge of and running said car at said time, to wit, first, in crossing Pacific Street where it intersects with East Street, at a high rate of speed, to wit, in excess of eight miles per hour; second, in permitting said car to approach Pacific Street where the same intersects with East Street,

within a distance of twenty-five feet or less, without ringing a bell or sounding a gong.

10. [Same as paragraph 9, omitting the specifications of negligence.]

11. That by reason of the death of said Carl Richard Schneider through the gross and reckless negligence of the defendant and its agents, servants, and employees in charge of and running said car at said time, plaintiff has been greatly damaged, to wit, in the sum of \$25,000, no part of which has been paid.

Wherefore, plaintiff prays judgment against defendant for the sum of \$25,000, together with costs of suit.

[Verification.]

William J. Herrin,
Attorney for plaintiff.

FORM No. 906—By husband and minor children, to recover damages for death of wife and mother of said minors.

(In *Johnson v. Southern Pacific R. Co.*, 154 Cal. 285; 97 Pac. 520.)

[Title of court.]

Frank W. Johnson, and Olin W.
Johnson and Leslie H. Johnson,
by C. F. Carrier, their guardian
ad litem, plaintiffs,

v.

Southern Pacific Railroad Com-
pany, a corporation, defendant.

[Introductory part.]

1. That the plaintiff Leslie H. Johnson is a minor, of the age of seventeen years, and plaintiff Olin W. Johnson is a minor, of the age of thirteen years; that on the 1st day of November, 1901, the superior court of the county of Santa Barbara, state of California, by its order duly given and made on said date, appointed C. F. Carrier, an attorney and counselor at law of this court, guardian ad litem for said minor plaintiffs herein, Leslie H. Johnson and Olin W. Johnson.

2. That the defendant is, and was at all the times hereinafter mentioned, a corporation duly organized and existing under the laws of the state of California, for the purpose, among other things, of maintaining and operating a single track steam railroad, of a standard gauge, commencing at or near San Miguel, in the county of San Luis Obispo, and running thence southerly through the counties of

San Luis Obispo, Santa Barbara, Ventura, and Los Angeles, to and through the town of Sagus, in Los Angeles County; that at all the times hereinafter mentioned defendant was maintaining and operating such steam railroad, and was the owner of the track, rolling-stock, and other appurtenances thereto belonging, of the said Southern Pacific Railroad Company.

3. That said railroad, above five miles west of the city of Santa Barbara, crosses obliquely the county road known as Hollister Avenue, about ninety rods east of the place where the road known as the Modoc Road enters said Hollister Avenue, the acute angle formed thereby being about thirty degrees; that the said crossing is an overhead one, the track being upon the bridge over said road, and the public road excavated so as to pass under the bridge, and being hedged by the sides of the cut on each side; that said bridge is supported by three abutments, one on each side of the county road and one in the middle; that the space between said abutments is about twelve feet, and said abutments are about eighty feet in length; that by reason of trees and other obstacles the view up and down the track is very much obstructed, so that persons driving along Hollister Avenue can not see approaching trains; that by reason of the said construction of said crossing the same is a dangerous one to persons driving along Hollister Avenue.

4. That on the 25th day of July, 1901, Katherine S. Johnson, the wife of the plaintiff Frank W. Johnson, and the mother of the plaintiffs Leslie H. Johnson and Olin W. Johnson, was driving from plaintiffs' home near Goleta along Hollister Avenue towards the city of Santa Barbara, and, as she approached said crossing, defendant caused one of its locomotives, with a train of cars attached thereto, to approach said crossing at a high rate of speed, and in so doing disregarded its duty to give signals of such approach, but, on the contrary, caused said train to approach negligently and carelessly and without signaling, either by blowing a whistle or ringing a bell, or by flag, or otherwise; that the said Katherine S. Johnson was therefore unaware of the approach of said train, and began to drive under said crossing before the passage of said train, and just as her horse and wagon were under said bridge said train passed over the same, negligently and carelessly as aforesaid.

5. That in consequence of the dangerous character of said crossing as maintained by defendant, and of the failure on its part by reason

of its negligence and carelessness to give the proper or any signal as its train approached said crossing, the horse of said Katherine S. Johnson was frightened and ran away, and she was thrown violently out of the wagon and killed.

6. That by reason of her death plaintiff Frank W. Johnson was deprived of her services and assistance and companionship, and the plaintiffs Leslie H. Johnson and Olin W. Johnson were deprived of the care, training, and society of their said mother, and plaintiffs have been damaged thereby in the sum of \$20,000.

Wherefore, plaintiffs pray judgment against the defendant in the sum of \$20,000, and costs of suit.

Richards & Carrier,
Attorneys for plaintiffs.
C. F. Carrier,

[Verification.]

Guardian ad litem for minor plaintiffs.

A demurrer to the complaint in form No. 906 was originally sustained by the trial court, but, upon appeal, the judgment for defendant following the sustaining of said demurrer, plaintiffs declining to further amend, was reversed: *Johnson v. Southern Pacific R. Co.*, 147 Cal. 624, 82 Pac. 806, 1 L. R. A. (N. S.) 307; s. c., 154 Cal. 285, 97 Pac. 520.

For defenses to actions for negligence generally, see ch. CV, forms Nos. 866-868.

§ 378. REPLICATION.

FORM No. 907—In action by administrator, for wrongful death of passenger on overloaded street-car.

(Adapted from *Olston v. Oregon etc. R. Co.*, 52 Ore. 343; 96 Pac. 1095; 97 Pac. 538; 20 L. R. A. (N. S.) 915n.)¹

[Title of court and cause.

Now comes the plaintiff and replies to the answer of the defendant herein, and alleges as follows:

1. Plaintiff, for reply to said answer, denies the execution of the

¹ **Fraud in procuring contract of release under seal.**—Defense in action at law as affected by statute.—On the rehearing of the case from which the foregoing form is taken, the court, with reference to the defense of fraud as against an instrument under seal, says: If a simple contract is induced by fraud, the defrauded party may rescind it without the aid of equity, and may plead the fraud in defense of an action to enforce it or to recover damages for its breach. The seal is primary evidence of a consideration, which means that the presumption thus arising may be overcome by evidence to the contrary, and is therefore subject to defenses at law, the same as a simple contract in which the consideration is expressed: *Olston v. Oregon etc. R. Co.* (Ore.), 97 Pac. 538, citing *Brown v. Freeman & Bynum*, 79 Ala. 406; *Strayhorn v. Giles*, 22 Ark. 517; *Aller v. Aller*, 40 N. J. 446; *Milliken v. Thorndike*, 103 Mass. 382; *Irving v. Thomas*, 18 Me. 418; *Williams v. Haines*, 27 Iowa 251, 1 Am. Rep. 268, distinguishing the last named case as to the force of the Iowa statute from the case of *Vandervelden v. Chicago etc. R. Co.* (C. C.), 61 Fed. 54, in which it was held that such defense is cognizable only in equity.

release as alleged therein, but states affirmatively that, being induced by false, fraudulent, and unlawful representations made by defendant with intent to defraud and deceive him, he signed the said release in his individual capacity, and not as administrator of the estate of decedent, and that thereafter he rescinded said settlement and tendered the return of all money, checks, and deposits, given by the defendant for said release.

2. That the following is a statement of the facts constituting said false, fraudulent, and unlawful representations made by defendant to the plaintiff, and because of which, and not otherwise, the plaintiff signed said alleged release: [Here are alleged the facts constituting the fraud.]

And for a second and separate reply, plaintiff alleges:

That said release and settlement, or settlement, is not binding upon the estate of the decedent or his personal representatives, for the reason that the same was made without an order of the county court authorizing the same.

Wherefore, plaintiff prays that said release be rescinded and canceled and decreed to be void and of no effect, and that plaintiff be awarded the relief prayed for in his complaint herein.

A. B., Attorney for plaintiff.

§ 379. JUDGMENT [OR DECREE].

FORM No. 908—For plaintiff upon verdict.

(In *Johnson v. Southern Pacific R. Co.*, 154 Cal. 285; 97 Pac. 520.)

[Title of court and cause.]

This cause came on regularly for trial. The said parties appeared by their attorneys,—Richards & Carrier, counsel for the plaintiffs, and Canfield & Starbuck, for defendant. A jury of twelve persons were regularly impaneled and sworn to try said action. Witnesses on the part of the plaintiffs and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and instructions of the court, the jury retired to consider of their verdict, and subsequently returned into court with the verdict, signed by the foreman, and, being called, answered to their names, and said: “We, the jury in this cause, find a verdict for the plaintiff for \$8,000.”

Wherefore, by virtue of the law, and by reason of the premises aforesaid, it is ordered, adjudged, and decreed, that plaintiffs have and recover from defendant the sum of \$8,000, with interest thereon

at seven per cent per annum from the date hereof until paid, together with plaintiffs' costs and disbursements incurred in this action, amounting to the sum of \$105.10.

Dated, February 2, 1906.

J. W. Taggart,
Judge of the Superior Court.

Forms of petition [and complaints] in actions for death by wrongful act: *Atchison etc. R. Co. v. Cochran*, 43 Kan. 225, 23 Pac. 151, 41 Am. & Eng. R. Cas. 48; *Weber v. Atchison etc. R. Co.*, 54 Kan. 389, 390, 38 Pac. 569; *Galveston etc. R. Co. v. Leonard* (Tex. Civ. App.), 29 S. W. 955; *Wellman v. Oregon etc. R. Co.*, 21 Ore. 530, 531, 28 Pac. 625.

Form of petition in an action by an administratrix to recover damages for the death of her husband, caused, as alleged, by the negligence of the defendant railroad companies: *St. Louis etc. R. Co. v. Willis*, 38 Kan. 330, 338, 16 Pac. 728.

Form of answer in an action to recover damages alleged to have resulted from wrongful death caused by the gross and wanton negligence of a railroad company: *Limekiller v. Hannibal etc. R. Co.*, 33 Kan. 23, 5 Pac. 401, 52 Am. St. Rep. 523, 19 Am. & Eng. R. Cas. 184.

Form of answer in an action to recover damages for death by wrongful act; action brought by the administrator for the benefit of the father and mother of the deceased: *Cherokee etc. Min. Co. v. Britton*, 3 Kan. App. 292, 298, 45 Pac. 100, 103.

Form of instructions to jury in an action brought to recover damages for death caused by the negligent explosion by defendant of a blast, whereby the plaintiff's intestate was killed: *Munro v. Pacific Coast Dredging etc. Co.*, 84 Cal. 515, 516, 24 Pac. 303, 18 Am. St. Rep. 248.

§ 380. ANNOTATIONS.—Death by wrongful act.

1. Time in which suit must be brought.
2. Statutory requirements must appear in the petition.
3. Existence of beneficiaries designated by the statute must be alleged.
4. Action under Arizona statute.
5. Existence of beneficiaries.—When not required to allege.
6. All heirs.—When necessary parties.
7. Substitution of representative for heirs as parties.
8. Foreign state.—Action maintained in.
- 9, 10. Manner of pleading negligence.—Specific and general allegations.
11. Damages.—Elements of.
12. "Sorrow, grief, and mental suffering."
13. "Society, comfort," etc.
14. Loss of services of child.
15. Pecuniary loss as measure of damages.
16. Pecuniary damages.
17. Measure of compensation to minors for death of parent.
18. Statutory limitation upon damages.
19. Passenger in automobile.—Death resulting from negligence.
20. Defenses.—Contributory negligence of parent.
- 21, 22. Unskilful treatment of patient.
23. Defenses of assumption of risk and contributory negligence of deceased.
24. Negligence and contributory negligence.—Questions of fact.

1. Time in which suit must be brought.—Actions for wrongful death are statutory, and the persons who alone may sue must sue within the time prescribed by the statute: *Clark*

v. Kansas City etc. R. Co., 219 Mo. 524, 118 S. W. 40, 45, and cases cited.

2. Statutory requirements must appear in the petition.—In statutory actions, such as that for wrongful death,

the party suing must bring himself strictly within the statutory requirements necessary to confer the right, and this must appear in the petition; otherwise, it shows no cause of action: *Barker v. Railroad*, 91 Mo. 94, 14 S. W. 282; *Clark v. Kansas City etc. R. Co.*, 219 Mo. 524, 118 S. W. 40, 45.

3. Existence of beneficiaries designated by the statute must be alleged.—Where the statute gives a right of action in favor of a designated class of beneficiaries in existence, the failure to aver in the declaration or complaint the existence of any of such latter class is fatal on demurrer: *Bartlett v. Chicago etc. R. Co.*, 21 Okla. 415, 96 Pac. 468, 470, quoting the rule as stated in 13 Cyc. 342.

4. Action under Arizona statute.—Action for damages resulting from death caused by the tort of another, under paragraph 2765 of the Revised Statutes of Arizona of 1901, is for the benefit of the estate of the decedent: *Southern Pacific Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401, 403.

Under the statute of Arizona (Rev. Stats. 1902, § 2765), creating a right of action for damages resultant from death caused by the tort of another, and providing: "Every such action shall be brought by and in the name of the personal representative of such deceased person; and, providing, that the father, * * * may maintain the action for the death of a child; * * * and the amount recovered in such action shall be distributed to the parties and in the proportions provided by law in relation to the distribution of personal estates left by persons dying intestate"; held, that a complaint is sufficient which contains allegations "that plaintiff and his wife are father and mother of the deceased; that plaintiff, on [a day stated], was the defendant's tenant of the premises in question, then owned by defendant; that the defendant wrongfully and negligently kept and maintained, and suffered to remain, upon the premises a certain adobe wall, exposed and in a dangerous condition; that defendant knowingly maintained said adobe wall with utter disregard to persons living and to business in and upon said premises, and knowingly and wilfully suffered said wall to remain in said dangerous condition after being notified of the said condition of

the said adobe wall; that without fault or negligence of the decedent or plaintiff the said wall fell on and instantly killed the decedent; that by reason of the premises, and by virtue of paragraph 2764 of the Revised Statutes, a cause of action has arisen in favor of plaintiff against defendant for damages for the death of said child; that said damages are \$4,800," etc. In this complaint the court held that every essential fact was disclosed. The complaint should, however, contain an allegation whether the plaintiff seeks to sue in a representative capacity, or whether he is attempting to sue in a personal capacity. The complaint above was indefinite in this respect; but inasmuch as the defendant failed to make any objection by special demurrer or by motion to make more definite and certain, the court held that such indefiniteness could not be cured on appeal, and that, in the main, the complaint sufficiently disclosed a right of action in the plaintiff in this representative capacity: *De Amado v. Freldman (Ariz.)*, 89 Pac. 588, 589 (for wrongful death of child—negligence in maintaining dangerous wall).

5. Existence of beneficiaries.—When not required to allege.—In such actions it is not incumbent upon the plaintiff to allege or prove the existence of beneficiaries, or the amount of damages suffered by them. Damages are deemed to have been caused to the estate by reason of the death, and are to be distributed as by law to those who are entitled by law to such estate: *Southern Pacific Co. v. Wilson*, 10 Ariz. 162, 85 Pac. 401, 402 (for damages for wrongful death of adult person—negligence resulting in railroad collision).

6. All heirs.—When necessary parties.—Under the California statute, an action for wrongful death may be brought either by the representative or all the heirs. If an action is brought by heirs, all must be joined therein, either as plaintiffs or defendants: *Salmon v. Rathjens*, 152 Cal. 290, 294, 92 Pac. 733.

7. Substitution of representative for heirs as parties.—In an action for wrongful death, the personal representative may be substituted in place of the widow and children, and such substitution is not in violation of the general rule forbidding a substitution of parties which operates to change the original cause of action: *Pugmire v.*

Diamond Coal etc. Co., 26 Utah, 115, 72 Pac. 385; Sargent v. Union Fuel Co. (Utah), 108 Pac. 928, 929.

8. **Foreign state.**—Action maintained in.—An action for death by wrongful act under a statute giving the right may be maintained in another state having a statute substantially similar in import and character: St. Louis etc. R. Co. v. Haist, 71 Ark. 258, 72 S. W. 893, 100 Am. St. Rep. 65; St. Louis etc. R. Co. v. McNamare, 91 Ark. 515, 122 S. W. 102, 105. See cases cited in note to Ralsor v. Chicago etc. R. Co., 2 Am. & Eng. Ann. Cas. 806.

9. **Manner of pleading negligence.**—Specific and general allegations.—A petition in which the following specific allegations are found was held not entitled to be treated as a petition charging general negligence; and held, further, that the same were intended as a specific summary of the more general allegations which preceded them, although this did not convert the pleading from one specifically alleging negligence to one alleging negligence only generally. The following are the allegations referred to: "That the death of plaintiff's said husband, George W. Evans, was caused by the carelessness and negligence of defendant's engineer running said passenger engine, in failing and neglecting to keep a proper lookout in front of his engine, and in failing and neglecting to observe the said freight engine and train standing on said track, and by the carelessness and negligence of the engineer and train crew of said freight train aforesaid, in failing and neglecting to give the proper signals to the engineer of said passenger engine in time to avoid said collision, thereby causing said collision and killing plaintiff's said husband as aforesaid": Evans v. Wabash R. Co., 222 Mo. 435, 121 S. W. 36, 41.

10. As to the manner of pleading negligence in actions to recover for wrongful death, see Chicago etc. R. Co. v. Smith (Ark.), 127 S. W. 715, 717.

11. **DAMAGES.**—Elements of.—Elements of damages proper to be considered by jury for which damages may be awarded to parents in actions for wrongful death are: (1) loss of child's services during minority; (2) mental anguish and suffering of parents; (3) expenses for medical attendance; and (4) funeral expenses: Karr v. Parks, 44

Cal. 46; Sykes v. Lawlor, 49 Cal. 236; Cleary v. City R. Co., 76 Cal. 240, 18 Pac. 269. (But see cases cited in paragraphs 12 and 14, post.)

12. "Sorrow, grief, and mental suffering."—Mental distress of parent consequent upon death of child is not an element of damages: Morgan v. Southern Pacific R. Co., 95 Cal. 510, 30 Pac. 601, 603, 17 L. R. A. 71, 29 Am. St. Rep. 143.

"Sorrow, grief, and mental suffering" are circumstances too remote to be taken into consideration by a jury in assessing damages: Munro v. Pacific Coast D. & R. Co., 84 Cal. 515, 525, 24 Pac. 303, 18 Am. St. Rep. 248. See State v. Baltimore etc. R. Co., 24 Md. 84, 87 Am. Dec. 600.

13. "Society, comfort," etc.—In estimating the pecuniary loss the jury may be instructed that they have a right to take into consideration the loss of society, comfort, and care suffered by the heirs in the death of a husband and father; but compensation for loss of society, comfort, and care can not be made a separate and distinct element of damage: Dyas v. Southern Pacific Co., 140 Cal. 296, 73 Pac. 972. See Munro v. Pacific Coast D. & R. Co., 84 Cal. 515, 24 Pac. 303, 18 Am. St. Rep. 248; Louisville etc. R. Co. v. Goodykoontz, 119 Ind. 111, 21 N. E. 472, 12 Am. St. Rep. 371, and note 12 Am. St. Rep. 375-383; Hale v. San Bernardino etc. Co., 156 Cal. 713, 716, 106 Pac. 83, and cases cited.

14. **Loss of services of child.**—In such a case the main element of damages is the loss of the child's services; and determination of such damages is left by the legislature to the discretion of the jury: Cleary v. City R. Co., 76 Cal. 240, 18 Pac. 269; Morgan v. Southern Pacific R. Co., 95 Cal. 510, 30 Pac. 601, 29 Am. St. Rep. 143, 17 L. R. A. 71.

15. **Pecuniary loss as measure of damages.**—In an action under a statute for negligence in wrongfully causing death, the damages must be confined to the pecuniary loss suffered by kindred and loss of comfort, society, support, and protection of the deceased: Munro v. Pacific Coast D. & R. Co., 84 Cal. 515, 527, 24 Pac. 303, 18 Am. St. Rep. 248.

16. **Pecuniary damages are limited to probable value of life of deceased to relatives:** Morgan v. Southern Pacific R. Co., 95 Cal. 510, 30 Pac. 601, 603, 29 Am. St. Rep. 143, 17 L. R. A. 71; Pepper v. Southern Pacific Co., 105, Cal. 389, 38

Pac. 974; *Lange v. Schoettler*, 115 Cal. 388, 392, 47 Pac. 139; *Ruppel v. United R. of San Francisco*, 1 Cal. App. 666, 82 Pac. 1073.

17. **Measure of compensation to minors for death of parent.**—Children have the right to receive from their father comfortable support and reasonably good education until they shall arrive at sufficient age to maintain themselves; and where the father, whilst able to perform this duty towards his children, loses his life through negligence of another, it was the intention of the statute to compel the offending party to make fair and just compensation for the injury. To accomplish that end would require a larger sum for a numerous family than if it consisted of but one or two persons. In like manner, if there be a surviving widow, who, if her husband had lived, would have been entitled to support from him appropriate to his circumstances and condition in life, she would be entitled to be fairly and justly compensated for loss in this respect which she suffered by his death: *Taylor v. Western Pacific R. Co.*, 45 Cal. 323, 329, 336.

18. **Statutory limitation upon damages.**—Under a statute limiting the amount of damages in an action for wrongful death, it is held that damages in such an action, the same being purely statutory, must be limited to the amount recoverable under the statute as the same existed at the time the accident happened. Where the legislature afterward increased the measure of damages recoverable in such actions, and this increase was in operation at the time of the trial, it is held that the effect was to create a new cause of action for the amount of the increase, and in this create a new right, and did not merely change the remedy: *Keeley v. Great Northern R. Co.*, 139 Wis. 448, 121 N. W. 167, 170.

19. **Passenger in automobile.**—Death resulting from negligence.—A complaint in an action by a wife to recover damages for personal injuries received by her husband, and which resulted in his death while a passenger in an automobile run for hire, has been held sufficient, and judgment affirmed thereon, where such complaint, in substance, charges: That on the 14th day of September, 1907, the plaintiff's husband became a passenger in an automobile run

for hire; that he was being conveyed therein from the city of Seattle to a point known as "The Meadows," some distance south of the city; that a car of the defendant, operated by electricity, through the negligence of the defendant's servants, ran into the automobile, overthrowing the same, and throwing the husband of the respondent out of the automobile and upon the planking in the highway at the place of contact with such force and violence as to produce injuries from which he died on the 27th day of October following, etc.: *Wilson v. Puget Sound Electric Car Co.*, 52 Wash 522, 101 Pac. 50, 51, 132 Am. St. Rep. 1044.

20. **DEFENSES.**—Contributory negligence of parent.—In an action for the alleged wrongful death of an infant, the contributory negligence of the parent suing may be invoked against such parent, and is always available as a defense where such contributory negligence of the defendant exists: *Palmer v. Oregon S. L. Co.*, 34 Utah 466, 98 Pac. 689, 697.

21. **Unskilful treatment of patient.**—The fact that a person injured is unskilfully treated, and that this contributed to his death, is no defense to an action for damages for causing his death: *Nagel v. Missouri etc. R. Co.*, 75 Mo. 653, 42 Am. Rep. 418; *Murphy v. Southern Pacific Co.*, 31 Nev. 120, 101 Pac. 322, 329.

22. **Defendant's liability in an action for causing death by negligence does not cease because the injured person did not adopt the best remedies or follow implicitly the directions of his physician:** *Texas etc. R. Co. v. Orr*, 46 Ark. 182; *Murphy v. Southern Pacific Co.*, 31 Nev. 120, 101 Pac. 322, 329.

23. **Defenses of assumption of risk and contributory negligence of deceased.**—In action by representatives to recover for death of deceased, and for alleged negligence of defendant, a judgment for the defendant was affirmed on the affirmative defenses, in substance, as follows: That said William Hollingsworth, Sr., [alleged in the complaint to have been killed by falling down an abandoned shaft on the property of the defendant,] had full knowledge of the condition of the shaft and of its dangerous character; that defendant had, prior to the 3d day of October, 1906, [the date of the death of the said Hollingsworth,] used

reasonable care in the repair of the shaft, and had placed it in a reasonably safe condition; that defendant had no notice or knowledge that the shaft had become out of repair or dangerous, until the 4th day of October, 1906; that if the shaft became dangerous or defective on the evening of the 3d day of October, 1906, the same was unknown to defendant; that said Hollingsworth had full knowledge of the condition of the shaft, and of the fact that it had become dangerous on the evening of October 3, 1906, and prior to the alleged accident, and told various men working with him for defendant of its condition, and advised them to notify defendant thereof immediately on the morning of October 4, 1906, and that, with full knowledge of the dangerous condition of the shaft, said Hollingsworth voluntarily continued his work as engineer without any objection, and thereby assumed all risk; that it was not necessary for Hollingsworth to approach the shaft in the performance of his duties as engineer; that, if he approached said shaft, it was upon his own suggestion and for his own individual purposes, with full knowledge of its dangerous condition, and without any instruction from defendant or necessity of the performance of his duties; that said Hollingsworth was killed because of his own contributory negligence: *Hollingsworth v. Davis-Daly E. C. Co.*, 38 Mont. 148, 99 Pac. 142.

24. Negligence and contributory negligence.—Questions of fact.—In general, all the questions as to the negligence of the defendant or the contributory negligence of the plaintiff are for the jury to determine. It is only when the character of the negligence is affirmatively conclusive and leads to an irresistible inference that the court will determine its character and effect. See *Schneider v. Market Street R. Co.*, 134 Cal. 482, 487, 66 Pac. 734, (by parent for damages resulting in the death of son—negligence of street railway company at crossing).

CHAPTER CX.

Neglligence of Carriers.—Actions by Persons other than Passengers.

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§ 381. CODE PROVISIONS.

Regulations to prevent accidents.

California, § 486. A bell, of at least twenty pounds weight, must be placed on each locomotive engine, and be run at a distance of at least eighty rods from the place where the railroad crosses any street, road, or highway, and be kept ringing until it has crossed such street, road, or highway; or a steam whistle must be attached, and be sounded, except in cities, at the like distance, and be kept sounding at intervals until it has crossed the same, under a penalty of one hundred dollars for every neglect, to be paid by the corporation operating the railroad, which may be recovered in an action prosecuted by the district attorney of the proper county, for the use of the state.

[Liability in damages.] The corporation is also liable for all damages sustained by any person, and caused by its locomotives, train, or cars, when the provisions of this section are not complied with. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Arizona, Rev. Stats. 1901, § 869.** • **Arkansas, Dig. of Stats. 1904 (Kirby), § 6595.** • **Idaho, Rev. Codes 1909, § 2821.** • **Iowa, Ann. Code 1897, § 2072.** • **Kansas, Gen. Stats. 1905 (Dassler), § 1389.** • **Minnesota, Rev. Laws 1905, § 5001.** • **Missouri, Ann. Stats. 1906, § 1102.** • **Nebraska, Comp. Stats. Ann. 1909, § 2047; Ann. Stats. (Cobbey), § 10579.** • **Nevada, Comp. Laws Ann. 1900 (Cutting), § 1012.** • **New Mexico, Comp. Laws 1897, § 3859.** • **North Dakota, Rev. Codes 1905, § 4295.** • **Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 1057; Comp. Laws 1909 (Snyder), § 1387.** • **South Dakota, Rev. Codes 1903, C. C. § 538.** • **Texas, Civ. Stats. 1897 (Sayles), Art. 4507.** • **Utah, Comp. Laws 1907, § 447.** • **Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 1809.**

• **Arizona, § 869.** Every railroad corporation shall cause a bell of at least twenty pounds weight to be attached to each of their locomotives, and shall cause the same to be rung at a distance of not less than eighty rods from the crossing of any public street, road or highway, under a penalty of one hundred dollars, to be recovered by action in the name of the territory in any court of competent jurisdiction, one-half of which shall go to the informer and the other half to the territory; and said corporation shall also be liable for all damages which may be sustained by any person

by reason of a non-compliance with the provisions of this section.

• **Arkansas, § 6595.** A bell of at least thirty pounds weight, or a steam whistle, shall be placed on each locomotive or engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said road shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of two hundred dollars for every neglect, to be paid by the corporation owning the railroad; one-half thereof to go to the informer and

the other half to the county; and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect.

c Iowa, § 2072. A bell and a steam whistle shall be placed on each locomotive engine operated on any railway, which whistle shall be twice sharply sounded at least sixty rods before a road crossing is reached, and after the sounding of the whistle the bell shall be rung continuously until the crossing is passed; but at street crossings within the limits of cities or towns the sounding of the whistle may be omitted, unless required by ordinance or resolution of the council thereof; and the company shall be liable for all damages which shall be sustained by any person by reason of such neglect. Any officer or employee of any railway company violating any of the provisions of this section shall be punished by fine not exceeding one hundred dollars for each offense.

d Kansas, § 1389. A steam whistle shall be attached to each locomotive engine, and be sounded three times at least, eighty rods from the place where the railroad shall cross any public road or street, except in cities and villages, under a penalty of not more than twenty dollars for every neglect of the provisions of this section, to be paid by the corporation owning the railway on the suit of the county attorney, one-half thereof to go to the informer, and the other half to the county for the support of common schools; and the corporation shall also be liable for all damages which shall be sustained by any person by reason of such neglect: Provided, however, that such penalty shall be sued for within one month from the time the cause of action accrues, and not thereafter: And provided further, but that one penalty shall be recovered in any one action.

e Minnesota, § 5001. Every engineer, driving a locomotive on any railway, who shall fail to ring the bell or sound the whistle upon such locomotive, or cause the same to be rung or sounded, at least eighty rods from any place where such railway crosses a traveled road or street, on the same level (except in cities), or to continue the ringing of such bell or sounding of such whistle at intervals until such locomotive and the train thereto attached shall have completely crossed

such road or street, shall be guilty of a misdemeanor.

f Missouri, § 1102. A bell shall be placed on each locomotive engine, and be rung at a distance of at least eighty rods from the place where the railroad shall cross any traveled public road or street, and be kept ringing until it shall have crossed such road or street, or a steam whistle shall be attached to such engine and be sounded at least eighty rods from the place where the railroad shall cross any such road or street, except in cities, and be sounded at intervals until it shall have crossed such road, or street, under a penalty of twenty dollars for every neglect of the provisions of this section, to be paid by the corporation owning the railroad, to be sued for by the prosecuting or circuit attorney of the proper circuit, within ten days after such penalty was incurred, one-half thereof to go to the informer, and the other half to the county; and said corporation shall also be liable for all damages which any person may hereafter sustain at such crossing when such bell shall not be rung or such whistle sounded as required by this section: Provided, however, that nothing herein contained shall preclude the corporation sued from showing that the failure to ring such bell or sound such whistle was not the cause of such injury.

g Nebraska, § 2047. A bell of at least thirty pounds weight or a steam whistle shall be placed on each locomotive engine, and shall be rung or whistled at the distance of at least eighty rods from the place where the said railroad shall cross any other road or street, and be kept ringing or whistling until it shall have crossed said road or street, under a penalty of fifty dollars for every neglect, to be paid by the corporation owning the railroad, one-half thereof to go to the informer, and the other half to this state, and also be liable for all damages which shall be sustained by any person by reason of such neglect. Provided, that this section shall not apply to cars or trains operated by electricity and that such electric cars and trains shall be equipped with air whistles which shall be whistled as herein provided.

h Nevada, § 1012, substantially same as Arizona § 869.

i New Mexico, § 3859, substantially same as Arizona § 869.

§ North Dakota, § 4295, substantially same as Arkansas § 6595, except in line 10, after "penalty of" change "two hundred" to "fifty" before "dollars"; also in fourth line from the end change "county" to "state."

§ Oklahoma, § 1057, substantially same as North Dakota § 4295, except in line 3 the word "eighty" before "rods" is changed to "eight," apparently in error.

§ South Dakota, Civ. Code, § 538, substantially same as North Dakota, § 4295.

§ Texas, Art. 4507. A bell of at least thirty pounds weight and a steam whistle shall be placed on each locomotive engine, and the whistle shall be blown and the bell rung at the distance of at least eighty rods from the place where the railroad shall cross any public road or street, and such bell shall be kept ringing until it shall have crossed such public road, or stopped; and each locomotive engine approaching a place where two lines of railway cross each other, shall, before reaching such railway crossing, be brought to a full stop; and any engineer having charge of such engine, and neglecting to comply with any of the provisions of this article, shall be fined in any sum not less than five nor more than one hundred dollars for such neglect, and the corporation operating such railway shall be liable for all damages which shall be sustained by any person by reason of any such neglect; provided, however, that the full stop at such crossings may be discontinued when the railroads crossing each other shall put into full operation at such crossing an interlocking switch and signal apparatus, and shall keep a flagman in attendance at such crossing.

§ Utah, § 447. Every locomotive shall be provided with a bell weighing not less than twenty pounds, which shall be rung continuously from a point not less than eighty rods from any street, road, or highway crossing, until such street, road, or highway shall be crossed, but the sounding of the locomotive whistle at least one-fourth of a mile before reaching any such crossing shall be deemed equivalent to ringing the bell as afore-

said, except in towns and at terminal points; during the prevalence of fogs, snow, and dust storms, the locomotive whistle shall be sounded before each street crossing while passing through cities and towns. All locomotives with or without trains, before crossing the main track at grade of any other railroad, must come to a full stop at a distance not exceeding 400 feet from the crossing, and must not proceed until the way is known to be clear; two blasts of the whistle shall be sounded at the moment of starting; provided, that whenever interlocking signal apparatus and derailing switches are adopted such stop shall not be required. Every person in charge of a locomotive, for any neglect to observe the provisions of this section shall be deemed guilty of a misdemeanor, and the corporation shall be liable for all damages which any person may sustain by reason of such neglect.

§ Wisconsin, § 1809. * * *

3. No such railroad company or corporation shall run any train or locomotive over any public traveled grade crossing within any incorporated city or village, except wherein gates are erected, maintained and operated, or a flagman is stationed, unless the engine bell shall be rung continuously within twenty rods of and until such crossing shall be reached by such train or locomotive. Provided, that flagmen or gates shall be placed and maintained, or such mechanical safety appliances shall be installed upon such street crossings in incorporated villages and cities over which trains pass as the public authorities of any such city or village may direct.

4. No such railroad company or corporation shall run any train or locomotive over any public traveled grade highway crossing, outside of the limits of any incorporated city or village, unless the whistle shall be blown eighty rods from such crossing and the engine bell rung continuously from thence until such crossing be reached by such train or locomotive. * * * * * (Amended July 12, 1907, Laws of 1907, p. 491.)

Liability for killing stock, etc.

California, § 485. Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track

and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed.

[When not liable in damages for killing stock.] Railroad corporations paying to the owner of the land through or along which their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence;

[When damages recoverable by company.] And the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents, or employees. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Alaska, Ann. Codes 1907, C. C. (Carter), §§ 334, 335. ^b Arizona, Rev. Stats. 1901, § 868; Laws 1905, pp. 65, 100, §§ 89, 90. ^c Arkansas, Dig. of Stats. 1904 (Kirby), § 6773. ^d Colorado, Rev. Stats. 1908, §§ 5480, 5481. ^e Hawaii, Rev. Laws 1905, § 805. ^f Idaho, Rev. Codes 1909, § 2814. ^g Iowa, Ann. Code 1897, §§ 2055, 2057. ^h Kansas, Gen. Stats. 1905 (Dassler), §§ 6314, 6318, 6377, 6379. ⁱ Minnesota, Rev. Laws 1905, §§ 1997-1999. ^j Missouri, Ann. Stats. 1906, § 1105. ^k Montana, Rev. Codes 1907, § 4308. ^l Nebraska, Comp. Stats. Ann. 1909, §§ 4686, 4687; Ann. Stats. (Cobbey), §§ 10571, 10572. ^m Nevada, Comp. Laws Ann. 1900 (Cutting), § 1011. ⁿ New Mexico, Comp. Laws 1897, §§ 241, 242. ^o North Dakota, Rev. Codes 1905, §§ 4299-4301. ^p Oklahoma, Comp. Laws 1909 (Snyder), §§ 1389, 1390-1392. ^q Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), §§ 5139, 5140. ^r South Dakota, Rev. Codes 1903, C. C. § 542, Sess. Laws 1907, p. 454, § 1. ^s Texas, Civ. Stats. 1897 (Sayles), Art. 4528. ^t Utah, Comp. Laws 1907, § 456x. ^u Washington, Code 1910 (Rem. & Bal.), §§ 8730-8732. ^v Wisconsin, Stats. 1898 (San. & Ber. Ann.), §§ 1810, 1812, 1813. ^w Wyoming, Rev. Stats. 1899, § 3213, Laws 1907, p. 136, §§ 1, 2.

^{a1} Alaska, C. C. § 334. Any person, persons, company or corporation, or lessee or agent thereof, owning or operating any railroad within the district, shall

be liable for the value of any horses, mules, colts, cows, bulls, calves, hogs, or sheep killed, and for reasonable damages for any injury to any such livestock upon or near any unfenced track of any railroad in the district, wherever such killing or injury is caused by any moving train or engine or cars upon such track. A substantial wire fence, four feet high, constructed with four strands of wire or its equivalent, shall be a legal fence.

a2 Alaska, C. C. § 335. No railroad track shall be deemed to be fenced within the meaning of this chapter unless such track is guarded by such fence against the entrance thereon of any such livestock on either side of the track, and not more than one hundred feet distant therefrom: Provided, complete natural defenses against the entrance of such stock upon said track, such as natural walls or deep ditches, shall be deemed and held to be a fence within the meaning of this chapter, when the same, in connection with other and ordinary lawful fences, form a continuous guard and defense against the entrance of such livestock upon the track.

b1 Arizona, § 868. In all cases where the livestock of any person or persons is injured or killed by locomotives or cars upon any portion of the line of any railroad company within this territory, unfenced by a good and sufficient fence or other barrier sufficient to turn livestock, by the company or corporation running such locomotives or cars, shall be liable in damages therefor to the owner or owners of such livestock, to be recovered in any court of competent jurisdiction within this territory, unless it be shown upon the trial of any action instituted for the recovery of such damages that the owner or owners of such livestock, his, her or their agent or agents, servant or servants, immediately contributed to such killing or injury. The mere straying of livestock upon such unfenced portions of such railroads shall not be held upon the trial of causes brought under this title to be any evidence of contributory negligence on the part of the owner or owners of such livestock; nor shall the grazing of the same unattended by a herder or herders be so considered. (See also p. 2039, and Laws 1905, pp. 65, 100, § 89.)

b2 Arizona, Laws 1905, pp. 65, 101, § 90. Every railroad corporation or company

operating any railroad or branch thereof, within the limits of this territory, which negligently injures or kills any horse, mare, gelding, filly, jack, jennie or mule, or any cow, helper, bull, ox, steer or calf, or any other domestic animal, by running an engine or engines, car or cars, over or against any such animal shall be liable to the owner of such animal for the damages sustained by such owner by reason thereof. The killing or injury shall be prima facie evidence of negligence on the part of such corporation or company. Same as paragraph 3040, R. S. 1901. (Re-enacted March 16, 1905.)

c Arkansas, § 6773. All railroads which are now or may be hereafter built and operated in whole or in part in this state shall be responsible for all damages to persons and property done or caused by the running of trains in this state.

d1 Colorado, § 5480. That every railroad company or corporation whose lines or road, or any part thereof is open to use, shall within six months after the passage of this act, and every railroad company or corporation formed or to be formed but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, except at the crossings of public roads and highways, and within the limits of incorporated towns and cities, erect, and thereafter maintain fences on the sides of their said roads, or the part thereof open to use, where the same passes through, along, or adjoining enclosed or cultivated fields or unenclosed lands, with openings and gates therein to be hung and have latches and hinges, so that they may be easily opened and shut at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad; and shall also construct where the same has not already been done, and hereafter maintain at all road crossings now existing, or hereafter established, good and sufficient cattle-guards. Such fences, gates and cattle-guards shall be amply sufficient to prevent horses, mules, cattle, sheep and other like animals from getting on said railroads; and so long as such fences, gates, and cattle-guards shall not be constructed after the time hereinbefore prescribed for making the same has elapsed, and when such fences and guards, or any part thereof, is not

sufficient or not in sufficiently good repair to accomplish the object for which the same, as herein prescribed, is intended, such railroad corporation shall be liable for any and all damages which shall be done by the agent, employees, trains or cars of such corporation, or by the employees, engines, trains or cars of any other corporation permitted and running over and upon their said railroad to any such cattle, horses, sheep, or other livestock thereon; and when such fences, gates, and guards have been built and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages unless negligently and wilfully done.

d2 Colorado, § 5481. Any railroad company hereafter running or operating its roads in this state, and failing to fence on both sides thereof against all livestock running at large at all points as herein provided, shall be absolutely liable to the owners of any such livestock killed, injured or damaged by their agents, employees, engines or cars or by the agents, employees, engines or cars belonging to any other railroad company or corporation running over and upon such road or there being.

e Hawaii, § 805. The corporation shall fence in the line of railway with a good and sufficient legal fence.

f Idaho, § 2814. Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track or property, whenever the line of their road at any time passes through or along, or abuts upon, or is contiguous to, private property, or enclosed land in the actual possession of another. (Remainder same as last two sentences of Cal. Civ. Code § 485.)

g1 Iowa, § 2055. Any corporation operating a railway, and failing to fence the same against livestock running at large and maintain proper and sufficient cattle-guards at all points where the right to fence or maintain cattle-guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle-guards for the full amount of the damages sustained by the owner on account thereof, unless it was occasioned by his wilful act or that of his agent; and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such corporation fails or

neglects to pay such damages within thirty days after notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by said corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damages actually sustained by him. No law of the state or any local or police regulations of any county, township, city or town, relating to the restraint of domestic animals, or in relation to the fences of farmers or land owners, shall be applicable to railway tracks, unless specifically so stated in such law and regulation. Upon depot grounds necessarily used by the public and the corporation, the operating of trains at a greater rate of speed than eight miles an hour where no fence is built shall be negligence, and shall render such corporation liable for all damages occasioned thereby, in the same manner and to the same extent, except as to double damages, as in cases where the right to fence exists.

g2 Iowa, § 2057. That section two thousand and fifty-seven (2057) of the Code be and the same is hereby repealed, and the following enacted in lieu thereof: "All railway corporations owning or operating a line of railway within the state shall construct, maintain, and keep in repair a suitable fence of posts and barb wire, or woven wire, or both combined, or posts and boards, or any other fence which the fence viewers shall determine to be equivalent thereto, on each side of the track thereof, so connected with cattle-guards at all public road crossings as to prevent cattle, horses, sheep, swine, and other livestock from getting on the railroad tracks. Such tracks shall be fenced within six months after the completion of the same or any part thereof. Such fence, when of barb wire, shall be of five wires; when of barb wire and woven wire, it shall consist of three barb wires above and woven wire not less than twenty-four inches wide at the bottom, or it may consist entirely of woven wire, in which event the woven wire shall be not less than fifty inches wide; all of the above to be securely fastened to posts not more than twenty feet apart, the top of such fences to be not less than fifty-four inches high; or such

fences may consist of five boards, securely nailed to posts set not more than eight feet apart, and to be not less than fifty-four inches high, provided, however, that, where such fences are constructed entirely of barb wire, in addition to the above, on the written request of any person owning land abutting such right of way, who has constructed, and is maintaining around his said land, or any part thereof, a hog-tight fence on all sides thereof except along such right of way, such railroad corporations shall re-enforce such right of way fence with such additional barb or woven wire as is necessary to make it hog tight. Fences repaired or rebuilt shall conform to the foregoing provisions. Nothing in this or the following sections shall be construed to compel a railway company operating a third-class line to fence its roads through the land of any farmer or other person who by written agreement with such company waives the fencing thereof." (Approved April 1, 1907, Sup. 1907.)

h1 Kansas, § 6314. Every railway company or corporation in this state, and every assignee or lessee of such company or corporation, shall be liable to pay the owner the full value of each and every animal killed, and all damages to each and every animal wounded by the engine or cars on such railway, or in any other manner whatever in operating such railway, irrespective of the fact as to whether such killing or wounding was caused by the negligence of such railway company or corporation, or the assignee or lessee thereof, or not.

h2 Kansas, § 6318. This act shall not apply to any railway company or corporation, or the assignee or lessee thereof, whose road is enclosed with a good and lawful fence to prevent such animal from being on such road.

h3 Kansas, § 6377, G. S. 1905. That section 5919 of the General Statutes of 1901 be and the same is amended to read as follows: Sec. 5919. Any person, persons or corporations owning land by or through which any railroad or any electric interurban line has been or may be constructed, who has enclosed or may enclose the same or any part thereof, and adjacent to the line of such railroad or interurban line, with either a lawful fence or a hog-tight fence, may demand of such railroad or interurban company that it enclose its line next thereto with a law-

ful fence or a hog-tight fence corresponding in class of fence to that maintained by the owner, and maintain the same; provided, that the following shall constitute a hog-tight fence for the purpose of this act: A woven-wire fence not less than twenty-six inches high with not less than seven cables and meshes not to exceed six inches in length. The bottom mesh shall be not more than three inches wide; the second not more than three and one-half inches wide, the third not more than four inches wide, the fourth not more than four and one-half inches wide, the fifth not more than five inches wide, and the sixth not more than six inches wide. The bottom wire of the said woven-wire fence shall be placed not to exceed two inches from the surface of the ground. And in addition to the woven wire already prescribed there shall be not less than three barbed wires placed above said woven wire. The first barbed wire above the woven wire shall be placed four inches above the top of the woven-wire fence. The second barbed wire shall be placed eight inches above the first barbed wire, and the third barbed wire to be placed eight inches above the second barbed wire; in all forty-eight inches. The posts shall be of ordinary size for fence purposes and set in the ground at least two feet deep and not to exceed sixteen feet apart. The barbs on the barbed wire shall not exceed six inches apart, said wire to be of not less than No. 13, standard gage.

Sec. 2. That original section 5919, General Statutes 1901, and all acts or parts of acts in conflict herewith, be and the same are hereby repealed.

Sec. 3. That this act shall take effect and be in force from and after its publication in the statute-book. (Amended as § 5919, G. S. 1901, Feb. 13, 1909, Laws 1909, p. 476.)

h4 Kansas, § 6379. If the party so notified shall refuse to build such fence in accordance with the provisions of this act, the owner or occupant of the land required to be fenced shall have the right to enter upon the land and track of said railroad company, and may build such fence; and the person so building such fence shall be entitled to the value thereof from such corporation or party operating or using such railroad, to be recovered with interest at the rate of one per cent per month from the time

such fence was built, together with a reasonable attorney's fee for the prosecution of any suit to recover the same.

11 Minnesota, § 1997. Every such company shall build and maintain, on each side of all lines of road owned and operated by it, good and substantial fences, except at stations and depot grounds and other places which the necessary business of the road or public convenience requires to be open, and except in the platted part of any municipality. Whenever the land of any person lying along the right of way of any railroad, is enclosed on three sides by a woven wire fence, such railroad company shall erect and maintain a woven wire fence of like character and quality along the said right of way enclosing the remaining side of said land. It shall also build and maintain such fences in such parts of any municipality as may be directed by the governing body thereof upon notice as in case of road crossings. It shall also build and maintain good and sufficient cattle-guards at all road crossings and other openings. (Amended Apr. 23, 1907, Laws 1907, p. 456.)

12 Minnesota, § 1998. Any such company failing to comply with the requirements of § 1997 shall be liable for all damages resulting therefrom, and for all domestic animals killed or injured by its negligence; and, if it shall fail to pay the actual damages occasioned by such killing or injury within thirty days after such damage occurs, then, in case of recovery therefor by action brought after such thirty days, if in district court the plaintiff shall recover double costs, and if in justice court ten dollars' costs. Such company, before the commencement of action, may make tender for such injury, and if the amount recovered, exclusive of interest, shall not exceed the tender, the plaintiff shall recover no costs nor disbursements.

13 Minnesota, § 1999. Any such company operating a line of railroad in this state, which has failed or neglected to fence said road and to erect crossings and cattle-guards, shall be liable for all damages sustained by any person in consequence of such failure or neglect: Provided, that the measure of damages for failure to construct or maintain such fence shall be as follows: The owner of any land abutting on the line of railway of such company may serve notice on

any of its station agents between April 1 and October 1 of any year, requiring the construction of a fence on the line between his land and its right of way. If such company shall not construct the same within forty days after service of such notice, the landowner may recover of the company an amount not exceeding twice the cost of such construction, with costs and reasonable attorney's fee, to be allowed by the court, or he may construct such fence after the expiration of such time, and receive from the company double the cost of construction, with like costs and attorney's fee. Such fence shall be kept in repair by such company in like manner and under like penalties as if built by such company. But failure to serve such notice shall not relieve such company from liability for damages for injuries to persons or domestic animals or other property, resulting from failure to fence its road.

1 Missouri, § 1105. Every railroad corporation formed or to be formed in this state, and every corporation to be formed under this article, or any railroad corporation running or operating any railroad in this state, shall erect and maintain lawful fences on the sides of the road where the same passes through, along, or adjoining enclosed or cultivated fields or unenclosed lands, with openings and gates therein, to be hung and have latches or hooks, so that they may be easily opened and shut, at all necessary farm crossings of the road, for the use of the proprietors or owners of the land adjoining such railroad, and also to construct and maintain cattle-guards, where fences are required, sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad; and until fences, openings, gates and farm crossings and cattle-guards as aforesaid shall be made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines or cars to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals escaping from or coming upon said lands, fields or enclosures, occasioned in either case by the failure to construct or maintain such fences or cattle-guards. After such fences, gates, farm crossings and cattle-guards shall be duly made and maintained, said corporation shall not be

liable for any such damage, unless negligently or wilfully done. If any corporation aforesaid shall, after three months from the time of the completion of its road through or along the lands, fields or enclosures hereinbefore named, fail, neglect or refuse to erect or maintain in good condition any fence, openings or farm crossings or cattle-guards as herein required, then the owners or proprietors of said lands, fields or enclosures may erect or repair such fences, openings, gates or farm crossings or cattle-guards, and shall thereupon have a right to sue and recover from such corporation in any court of competent jurisdiction the cost of such fences, openings, gates, cattle-guards or repairs, together with a reasonable compensation for his time, trouble and labor in and about the construction of such fences, openings, gates or cattle-guards, or the making of such repairs, together with a reasonable compensation for his time, trouble and labor in and about the construction of such fences, openings, gates or cattle-guards, or the making of such repairs, together with ten per cent interest per annum thereon, from the time of the service of process upon such corporation in such suit: Provided, that before such repairs are commenced, such owner shall give five (5) days' notice, in writing, to the railroad company, by delivering a copy thereof to the nearest section foreman or station agent of such railroad company, that the railroad fence needs repairs at a place or point named in the notice, on the lands of such owner. And in every such action, if the plaintiff recover judgment, there shall be taxed as costs against the defendant an attorney's fee, to be fixed by the court of justice before which or whom the cause may be pending, at such sum as may be a reasonable compensation for all legal services rendered for plaintiff in the case, without regard to any agreement between plaintiff and his counsel as to fees; but such fee shall not be taxed so long as any appeal taken in such case shall remain undisposed of. And if any person shall ride, lead or drive any horses or other animals upon such road within such fences and guards other than a farm crossing, without the consent of the corporation, he shall, for every such offense, forfeit and pay a sum not exceeding ten dollars, and shall also pay all damages

which shall be sustained thereby to the party injured. If any person not connected with or employed upon the railroad shall walk upon the track or tracks thereof, except where the same shall be laid across or along a publicly traveled road or street, or at any crossing, as hereinbefore provided, and shall receive harm on account thereof, such person shall be deemed to have committed a trespass in so walking upon said track in any action brought by him on account of such harm against the corporation owning such railroad, but not otherwise.

k Montana, § 4308. Railroad corporations must make and maintain a good and legal fence on both sides of their track and property, and maintain, at all crossings, cattle-guards over which cattle or other domestic animals cannot pass. In case they do not make and maintain such fence and guards, if their engines or cars shall kill or maim any cattle or other domestic animals upon their line of road, they must pay to the owner of such cattle or other domestic animals, in all cases, a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Provided, that nothing herein shall be construed so as to prevent any person, or persons, from recovering damages from any railroad corporation for its negligent killing or injury to any cattle, or other domestic animals, at spurs, sidings, Y's, crossings and turntables.

l1 Nebraska, § 4686. That every railroad corporation whose lines of road or any part thereof is open for use shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitable and amply sufficient to prevent cattle, horses, sheep, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities, and villages, with openings, or gates, or bars at all the farm crossings of such railroad, for the use of the proprietors of the lands adjoining such railroad, and shall also construct, where the same has not already

been done, and hereafter maintain at all road-crossings, now existing or hereafter established, cattle-guards suitable and sufficient to prevent, cattle, horses, sheep, and hogs from getting on to such railroad, and so long as such fences and cattle-guards shall [not] be made after the time hereinbefore prescribed for making the same shall have elapsed, and when such fences and guards, or any part thereof, are not in sufficiently good repair to accomplish the object for which the same is herein prescribed, is intended, such railroad corporation and its agents shall be liable for any and all damages which shall be done by the agents, engines, or trains of any such corporation, or by the locomotives, engines, or trains of any other corporations, permitted and running over or upon their said railroad, to any cattle, horses, sheep, or hogs thereon; and when such fences and guards shall have been fully and duly made, and shall be kept in good and sufficient repair, such railroad corporation shall not be liable for any such damages, unless negligently or wilfully done.

12 Nebraska, § 4687. Any railroad company hereafter running or operating its road in this state, and failing to fence on both sides thereof, against all livestock running at large at all points, shall be absolutely liable to the owner of any livestock injured, killed, or destroyed by their agents, employees, or engines, or by the agents, employees, or engines belonging to any other railroad company, running over and upon such road, or there being; provided, that in case the railroad company liable under the provisions of this section, shall neglect or refuse to pay the value of any property so injured or destroyed, after thirty days' notice in writing given, accompanied by an affidavit of the injury or destruction of said property, to any officer of the company, or any station agent, or ticket agent, or conductor employed in the management of its business, in the county where the injury complained of shall have been committed, such railroad company, their agents, and employees shall, in an action brought to recover damages therefor, be held and they are hereby declared to be liable to pay double the value of the property so injured, killed, or destroyed as aforesaid.

m Nevada, § 1011, last three sentences substantially same as Cal. Civ. Code § 485.

n1 New Mexico, § 241. Hereafter every railroad corporation whose lines of road, or any part thereof, are open for use, shall, within six months after the passage of this act, and every railroad company formed or to be formed, but whose lines are not now open for use, shall, within six months after the lines of such railroad or any part thereof are open, erect and thereafter maintain fences on the sides of their said railroad, or the part thereof so open for use, suitably and amply sufficient to prevent cattle, horses, sheep, mules, burros, and hogs from getting on the said railroad, except at the crossings of public roads and highways, and within the limits of towns, cities and villages, and shall also construct, where the same has not already been done, and hereafter maintain at all public road crossings, now existing or hereafter established, cattle-guards suitable and sufficient to prevent cattle, horses, sheep, mules, burros, and hogs from getting onto said railroad. If any railroad corporation shall fail to construct such fences and cattle-guards as herein directed, each and every one of said railroad corporations so failing to comply with the directions of this act, shall be liable in damages in the manner and to the extent hereinafter limited and provided. And any railroad corporation which has so failed to fence its line, in addition to the penalties above described shall be and hereby is required to post a notice in a conspicuous place upon its depot building at the county seat of the county through which its line or lines may run, every ninety (90) days, giving therein a full description of the brands and marks of every animal killed or damaged during the ninety days next preceding the posting of said notice. (Amended Mch. 21, 1901, Laws 1901, p. 165.)

n2 New Mexico, § 242. Whenever any cattle, horses, sheep, mules, burros or hogs shall be killed, injured or destroyed by any railroad company operating a railroad in this territory, or by its agents, trains, cars or locomotives, at any point on its line of road, where by law such railroad is required to be fenced, and the owner of any such animal, so killed, injured or destroyed, shall make affidavit

of his ownership and of the injury or destruction of said property, and of the value of the same or of the amount of injury done thereto, and file the same with and give ninety days' notice in writing to any station agent, employed in the management of the business of such railroad company, in the county where the killing, injury or destruction complained of shall have been committed, such killing, injury or destruction is hereby made prima facie evidence of the negligence on the part of such railroad company; and if such railroad company, at the expiration of said ninety days shall not have paid for the animal killed the fair market value thereof, or if the animal has not been killed, the actual amount of damage done by reason of the injury inflicted by such railroad company, upon suit brought for the recovery of damages for such killing, injury or destruction, judgment shall be rendered against said railroad company for the actual value of the animal or for the damage inflicted, if the animal has not been killed, unless said company shall be able to overcome the presumption of negligence based upon the fact of the killing, injury or destruction as herein provided and establish that such killing, injury or destruction was not the result of negligence on the part of said railroad company or its agents in the management of its trains, cars or locomotives: Provided, that if the owner make claim for a greater sum than the actual market value of the property killed or destroyed, or for greater damage than was sustained by him on account of any injury to any such animal or animals, then and in such event, in case judgment shall be rendered against the railroad company for a sum not exceeding or for a less sum than the amount offered and for which voucher was tendered by such railroad company in settlement and satisfaction of such claim, the costs of the action shall be taxed against such owner: And, provided, further, The provisions of this act shall apply to railroad corporations in the hands of receivers and in order to sue such receiver it shall not be necessary to obtain permission of the court by whom such receivers were appointed.

01 North Dakota, § 4299. Whenever the owner of any tract of land abutting against any line of railroad within this

state shall desire to enclose any such tract of land for pasturage or other purposes and shall construct a good and sufficient fence about said tract of land on all sides except along the side abutting against such railroad it shall be the duty of such railroad company to construct a good and sufficient fence not less than four and one-half feet high on the side of such tract or lot as far as the same extends along the line of such railroad and to maintain the same in good repair and condition, until released therefrom by the owner of said tract or until the owner of said tract shall have ceased to maintain, in good repair and condition for the term of one year, his portion of the fence around such enclosure.

02 North Dakota, § 4300. Whenever the owner of any tract of land shall have completed his portion of the fence about such proposed enclosure he shall give written notice of its completion to the railroad company upon whose line said tract is situated by personal service upon the agent of said company at the station nearest to the proposed enclosure describing in said notice the situation of said tract and the number of acres to be enclosed, as near as may be, and the length of the fence required along the line of such railroad to complete the proposed enclosure; and it shall be the duty of the railroad company to construct and complete its portion of such fence within sixty days after the service of such notice.

03 North Dakota, § 4301. If any railroad company shall neglect or refuse to comply with any of the requirements of the last two sections it shall be lawful for the owner of such tract to construct or repair the fence along the line of such railroads and the railroad company shall be liable to the owner thereof to an amount not exceeding one dollar and twenty-five cents per rod, to be recovered in a civil action; and such railroad company shall be liable for all damages accruing by reason of such neglect or refusal.

01 Oklahoma, Comp. Laws 1909 (Snyder), § 1389. It shall be the duty of every person or corporation owning or operating any railroad in the State of Oklahoma to fence its road, except at public highways and station grounds, with a good and lawful fence.

p2 Oklahoma, Comp. Laws 1909 (Snyder), § 1390. A lawful fence, under the provisions of this act, shall be composed of posts and barb wires, four wires to be firmly fastened to the posts, such posts to be not more than one rod apart, the top wire to be not less than fifty-four nor more than fifty-eight inches from the ground, and the bottom wire to be not more than twenty nor less than fourteen inches from the ground.

p3 Oklahoma, Comp. Laws 1909 (Snyder), § 1391. Any person owning or occupying land adjacent to any railroad track of any railroad company shall have the right to attach to the fence constructed along the track or right of way of said railroad company, any wires, boards or other material, so as to make the fence of said railroad company sufficient to prevent any hogs or pigs from getting upon the track of said railroad company.

p4 Oklahoma, Comp. Laws 1909 (Snyder), § 1392. Whenever any railroad corporation or the lessee, person, company or corporation operating any railroad, shall neglect to build and maintain such fence, as provided in this act, such railroad corporation, lessee, person, company or corporation operating the same, shall be liable for all animals killed by reason of the failure to construct such fence.

q1 Oregon, § 5139, substantially same as Alaska Civ. Code § 334, except omit last sentence.

q2 Oregon, § 5140, substantially same as Alaska Civ. Code § 335, except in line 8, after "therefrom," insert "Provided, that whatever is a lawful fence under the laws of this state in the county where such killing or injury shall occur, and no other, under the laws of this state shall be held a lawful fence under this act," before the proviso in the Alaska section.

r1 South Dakota, C. C., § 542. Whenever the owner of any tract of land abutting against any line of railroad within the state shall desire to enclose any such tract of land for pasturage or farm purposes, and shall construct a good and sufficient fence about said tract of land on all sides except along the side abutting against such railroad, it shall be the duty of such railroad company to construct a fence not less than four and one-half feet high, and if the owner enclose any such tract of land for pastur-

age or farm purposes, with a woven wire fence with wires crossing each other close enough to keep sheep and hogs within, it shall be the duty of such railroad to construct a like fence along its right of way on the side of such tract or lot so far as the same extends along the line of such railroad, and to maintain the same in good repair and condition until released therefrom by the owner of said tract, or until the owner of said tract shall have ceased to maintain in good repair and condition for the term of one year his portion of the fence around such enclosure. (Amended, Feb. 9, 1909, Sess. Laws 1909, p. 13.)

All acts or parts of acts in conflict with this act are hereby repealed.

Whereas, an emergency is declared to exist, this act shall take effect and be in force from and after its approval.

Approved February 9, 1909.

r2 South Dakota, Sess. Laws 1907, p. 454, § 1. Any corporation operating a railway and failing to properly fence the same against livestock and keep the same in repair and maintain proper and sufficient cattle-guards at all points where the right to fence or maintain cattle-guards exists, shall be liable to the owner of any stock killed or injured by reason of the want of such fence or cattle-guard, for the full amount of the damage sustained by the owner on account thereof, unless it was occasioned by his act or that of his agent; and to recover the same it shall only be necessary for him to prove the loss of or injury to his property. If such corporation fails or neglects to pay such damage within sixty days after notice in writing that a loss or injury has occurred, accompanied by an affidavit thereof, served upon any officer or station or ticket agent employed by said corporation in the county where such loss or injury occurred, such owner shall be entitled to recover from the corporation double the amount of damage actually sustained by him. If such railway company shall, within said sixty days, offer in writing to pay a fixed sum, being the reasonable market value of the animals so killed, and the owner thereof shall refuse to accept the same, then in any action thereafter brought for damages where such owner recovered a less sum as the value of the animals so killed than the amount so offered, then

such owner shall recover only the actual value of such animals and the railway company shall recover its cost against such owner. No law of the state or any local or police regulation of any county, township, city or town relating to the restraint of domestic animals, or in relation to the fences of farmers or land-owners, shall be applicable to railway tracks, unless specifically so stated in such law and regulation. Upon depot grounds necessarily used by the public and the corporation, the operating of trains at a greater rate of speed than eight miles an hour where no fence is built shall be negligence, and shall render such corporation liable for all damages occasioned thereby in the same manner and to the same extent, except as to double damages, as in cases where the right to fence exists. (Enacted Feb. 20, 1907.)

• Texas, Art. 4528. Each and every railroad company shall be liable to the owner for the value of all stock killed or injured by the locomotives and cars of such railroad company in running over their respective railways, which may be recovered by suit before any court having competent jurisdiction of the amount. If the railroad company fence in their road, they shall only then be liable in cases of injury resulting from want of ordinary care.

• Utah, § 453x. Every railroad company operating a railroad by steam power within this state is hereby required to erect, within six months after the approval of this section (March 12, 1903), and thereafter maintain, a fence on each side of its railroad where the same passes through lands owned and improved by private owners, and connect the same, at all public road crossings, with cattle-guards. Such fence shall not be less than four and a half feet in height and may be constructed of barbed or other fencing wire and shall consist of not less than five wires, with good, substantial posts not more than one rod apart, with a stay midway between said posts attached to the wires of said fence to keep said wires in place; and whenever such railroad company shall provide gates for private crossings, for the convenience of the owners of the land through which such railroad passes, such gates shall be so constructed that they may be easily operated; and any

such corporation shall be liable for all damages sustained by the owner of any domestic animal killed or injured by such railroad, in consequence of the failure to build or maintain such fence.

u1 Washington, § 8730. Every person, company or corporation having the control or management of any railroad shall, within six months after the passage of this act, outside of any corporate city or town, and outside the limits of any sidetrack or switch, cause to be constructed and maintained in good repair on each side of said railroad, along the line of said right of way of such person, company or corporation operating the same, a substantial fence, and at every point where any roadway or other public highway shall cross said railroad, a safe and sufficient crossing must be built and maintained, and on each side of such crossing and at each end of such sidetrack or switch, outside of any incorporated city or town, a sufficient cattle-guard: Provided, that any person holding land on both sides of said right of way shall have the right to put in gates for his own use at such places as may be convenient.

u2 Washington, § 8731. Every such person, company or corporation owning or operating such railroad shall be liable for all damages sustained in the injury or killing of stock in any manner by reason of the failure of such person, company or corporation, to construct and maintain such fence or such crossing or cattle-guard; but when such fences, crossings and guards have been duly made, and shall be kept in good repair, such person, company or corporation shall not be liable for any such damages, unless negligently or unlawfully done.

u3 Washington, § 8732. In all actions against persons, companies or corporations, operating steam or electric railroads in the state of Washington, for injury to stock by collision with moving trains, it is prima facie evidence of negligence on the part of such person, company or corporation, to show that the railroad track was not fenced with a substantial fence or protected by a sufficient cattle-guard at the place where the stock was injured or killed.

v1 Wisconsin, § 1810. Every railroad corporation operating any railroad shall erect and maintain on both sides of any

portion of its road (depot grounds excepted) good and sufficient fences of the height of four and a half feet, with openings or gates or bars therein, and suitable and convenient farm crossings of the road for the use of the occupants of the lands adjoining, and shall construct and maintain cattle-guards at all highway crossings and connect their fences therewith to prevent cattle and other domestic animals from going on such railroad. All roads hereafter built shall be so fenced and such cattle-guards be made within three months from the time of commencing to operate the same, so far as operated. Until such fences and cattle-guards shall be duly made every railroad corporation owning or operating any such road shall be liable for all damages done to cattle, horses or other domestic animals, or persons thereon, occasioned in any manner, in whole or in part, by the want of such fences or cattle-guards; but after such fences and cattle-guards shall have been in good faith constructed such liability shall not extend to damages occasioned in part by contributory negligence nor to defects existing without negligence on the part of the corporation or its agents. A barbed wire fence consisting of not less than five barbed wires, with at least forty barbs to the rod, firmly fastened to posts, well set, not more than sixteen and one-half feet apart, with one good stay between, the top wire not less than forty-eight inches high and the bottom wire not more than eight inches from the ground, and the spaces between the bottom and second and second and third wires from the ground not more than eight inches each shall be deemed a good and sufficient fence; and no fence shall be required in places where the proximity of ponds, lakes, watercourses, ditches, hills, embankments or other sufficient protection renders a fence unnecessary to protect cattle or other domestic animals from straying upon the right of way or track; provided, that nothing herein shall affect or render unlawful any fence built by any railroad company prior to the thirtieth day of March, 1881.

vs Wisconsin, § 1812. Whenever a railroad corporation is required by law to fence its track or railroad or to maintain or keep in repair any such fence and shall neglect or refuse to build or

build or repair such fence, as the case may be, the owner or occupant of the land adjoining such railroad or over or through which the said railroad track shall or may be laid may, between the first day of April and the first day of October next succeeding, give notice in writing to such corporation to build, within sixty days or repair within thirty days, such fence, as the case may be, after the service of such notice. Such notice shall describe the land on which such fence is required to be built or repaired, and service thereof may be made by delivering the same to any station agent of said corporation. In case the corporation or agent so notified shall refuse or neglect to build or repair the fences on the land described in such notice within the time aforesaid, then such owner or occupant may build or repair the same, as the case may be; and may recover by action from such corporation the cost thereof with interest at one per cent per month from the time such fence shall have been built or repaired.

vs Wisconsin, § 1813. 1. Whenever any railroad corporation shall operate a railroad over or through enclosed lands and shall fail to construct the fences, farm crossings or cattle-guards required by section 1810, proper for the use of such lands, the owner or occupant thereof may give notice in writing signed by him to such corporation, to be served as a summons in a court of record is required to be served on such corporation, to fence its road so running through his enclosed lands, describing the same, and construct the necessary farm crossings and cattle-guards thereon.

2. If such company, after being so notified, neglect for three months so to construct such fences, farm crossings and cattle-guards, it shall be liable to pay to such owner or occupant ten dollars for each * * * day after the expiration of said three months until so constructed.

3. But no time between any first day of November and the first day of April next succeeding shall be included in the three months aforesaid. (Amended July 13, 1907, Laws 1907, p. 495.)

w1 Wyoming, § 3213. Any corporation operating a railway, or railroad, within this state, which shall injure or kill any livestock, by running any engine or engines, car or cars, over or against any

such livestock, shall be liable to the owner or owners of such livestock, for the damage sustained by such owner or owners, by reason of such injury or killing of such livestock.

ws Wyoming, Sess. Laws 1907, p. 136, § 1. All railway corporations, owning or operating a line of railway within the state, shall construct, maintain and keep in repair on each side of the track thereof, a sufficient fence, so connected with suitable cattle-guards at all public crossings as to prevent stock from getting on the railroad track of said corporation, and such fence when of barb wire to consist of four wires securely fastened to posts set not more than thirty-two feet apart, with stays not more than ten feet apart. Such fence shall be constructed within nine months after the completion of any railroad track or any part thereof, and in the case of railroads now constructed and in operation, within three months after the approval of this act. Provided, that railway corporations shall not be required to construct and maintain a fence within

the boundaries of any incorporated city or town. (Enacted Feb. 18, 1907.)

ws Wyoming, Sess. Laws 1907, p. 136. § 2. Any corporation operating a railway and failing to fence the same and to construct and maintain suitable cattle-guards as required by Section 1 hereof, shall be liable to the owner or owners of any livestock killed or injured by reason of its failure to construct or keep in repair such fence or cattle-guard in the manner provided in this act, for the full amount of the damage sustained by the owner on account thereof and to make a prima facie case for recovery, it shall only be necessary for such owner to prove the loss or injury to his property; provided, that no corporation operating a railroad shall be liable for any damage occasioned by the wilful act of the owner or of his agent or employees or for stock killed or injured on public road crossings unless negligence on the part of such corporation, its agents, servants or employees can be shown. (Enacted Feb. 18, 1907.)

§ 382. COMPLAINTS [OR PETITIONS].

FORM No. 909—For damages for negligence of street railway company at street-crossing.

(In *Brown v. Los Angeles R. Co.*, 2 Cal. App. 618; 84 Pac. 362.)

[Title of court and cause.]

Plaintiff, for cause of action against the defendant, alleges:

1. That at all the times mentioned herein the defendant was, and it yet is, a corporation organized and existing under and in pursuance of the laws of the state of California, and defendant at all said times was the owner of, and engaged in operating, that certain street railway in the city of Los Angeles, California, in Flower Street in said city, from Tenth Street south, having its track across Twelfth Street, and at all said times said defendant operated cars on said railway by means of electric power.

2. That on or about the 12th day of September, 1903, while this plaintiff was crossing said Flower Street at the junction of the same with Twelfth Street, the plaintiff was driving one horse attached to a buggy in which he was riding, and in the rear of said buggy, and attached thereto, he had a hack, and in the rear of said hack, and attached thereto, a wagon called a runabout, all of which said car-

riages he was moving east on Twelfth Street, and while he was so doing, the defendant, without the exercise of any care, and by reason of its negligence, caused one of defendant's cars to come in collision with the hack so being drawn by plaintiff, thereby throwing plaintiff from his said buggy upon the ground, and causing his said horse to become frightened and to drag plaintiff on the ground for a great distance and to inflict upon plaintiff the following personal injuries, to wit: [Here injuries are described.]

3. That by reason of the personal injuries so sustained by plaintiff as hereinbefore alleged plaintiff has sustained damage in the sum of \$20,000.

Wherefore, plaintiff asks judgment against defendant for the sum of \$20,000, and for costs of this suit.

[Verification.]

Waters & Wylie,
Attorneys for plaintiff.

FORM No. 910—For damages for negligence of steam railroad company at crossing.

(In *Missouri Pacific R. Co. v. Johnson*, 44 Kan. 660; 24 Pac. 1116.)

[Title of court and cause.]

[Introductory part, and after averment of defendant's incorporation:]

That on the 3d day of April, 1887, the defendant was operating a certain line of railroad through the county of Wilson, state of Kansas, known as the Verdigris Valley, Independence, and Western Railroad, which said railroad, so operated by defendant, runs across a certain highway, which said highway was duly and legally laid out and traveled prior to the construction of said railroad; that where said railroad crossed said public highway, and prior to the construction of said railroad, the ground was smooth and level; that in constructing said railroad an embankment some six feet high was thrown up by the defendant company, upon which it constructed its said road; that the defendant negligently and carelessly constructed approaches to said crossing, which were narrow, steep, and unsafe, and have failed to restore said public highway to its former condition, or to such condition as did not materially impair its usefulness; that the approach to the railroad by the public highway was obstructed by a high hedge along the north side of the highway, so it was impossible for any person using the highway to observe a train

or other object from the hedge; that where the railroad passes through the hedge fence an opening was cut for a distance of eighty feet in width, and, aside from this opening, this hedge fence grew upon the north side of the highway a distance of half a mile, and a distance of a quarter of a mile on each side of the railroad track, which rendered said crossing very dangerous, unless a great deal of care was exercised upon the part of the railway company in operating the road; that on the 3d day of April, 1887, the plaintiff was traveling upon said highway in a wagon drawn by two mules, going in an easterly direction; that said railroad, by reason of said hedge fence, was entirely obstructed from view of the plaintiff north of the crossing; that the plaintiff, knowing the dangerous condition of said crossing, approached the same with great care, intending to stop, look, and listen for an approaching train, but upon approaching said crossing, and before she could get a view of said track, defendant, its agents and servants, ran one of its trains of cars drawn by a locomotive engine down said track in a southeasterly direction, and over said crossing, which said train passed directly in front of the mules driven by plaintiff's husband, and caused them to jump from the narrow approach to said crossing, down an embankment a distance of six feet, carrying with them the wagon in which plaintiff was then sitting; that by reason of the premises the plaintiff was thrown out of said wagon, down said embankment, striking a post upon the side of the highway, then dragged by said team a distance of eighteen feet, and was mangled, bruised, and injured.

Plaintiff avers that defendant neglected and failed to sound the whistle of said locomotive engine eighty rods before approaching said crossing, by reason whereof she was not warned of said approaching train until the same passed over the crossing immediately in front of the mules driven by her husband; that had defendant's agents and servants sounded said whistle, as it was their duty to do, eighty rods before approaching said crossing, she would have heard the same and averted the accident.

[Prayer, etc.]

S. S. Kirkpatrick,
Attorney for plaintiff.

FORM No. 911—By pedestrian for damages for personal injuries caused by the negligence of a railroad company.

(In *Cotner v. St. Louis etc. R. Co.*, 220 Mo. 284; 119 S. W. 610.)

[Title of court and cause.]

[After formal parts, and statement as to the incorporation of the defendant company, the petition proceeds as follows:]

That on November 4, 1904, while he, the plaintiff, was walking northeastward on the railroad tracks of the defendant, within the village limits of the village of Steele, in Pemiscot County, Missouri, an incorporated village, duly incorporated under the laws of Missouri, where the track was level and straight for a long distance, and where, from the time of its construction, pedestrians had been accustomed to use the same as a footpath, by the forbearance and tacit consent of the defendant, plaintiff, by reason of the carelessness, negligence, and recklessness of defendant's agents, servants, and employees in charge of its train, was run over and injured.

2. That the defendant's agents, servants, and employees in charge of said train, saw, or by the exercise of reasonable care and diligence, and had they not been reckless in operating said train at a late hour in the night-time, to wit, about 11 o'clock P. M., without a headlight lighted upon the front part of its engine or train of cars, could have seen, the dangerous position in which plaintiff was situated; and saw, or by reasonable care and diligence, if said train had not been recklessly operated by them, could have seen, the imminent peril in which plaintiff was placed.

3. That plaintiff was unaware of the dangerous approach of said train, and defendant failed to sound the bell and ordinary signals in time to avert the injuries herein complained of, and in fact did not at any time before said time either ring a bell or sound a whistle, or give any other signal by which the plaintiff might be warned of the near or dangerous approach of said train, and negligently failed to use the brakes and other appliances provided for the stopping of said train, made up as aforesaid, and negligently failed to use the appliances at hand for the stopping of the same before it struck and injured plaintiff, but, on the contrary, recklessly, negligently, and wantonly ran its engine and train of cars against, upon, and over plaintiff, thereby crushing his right foot and ankle, necessitating amputation of the right foot and leg, [etc., here specifying other injuries inflicted upon plaintiff].

That by reason of the injuries aforesaid plaintiff is permanently disabled, to his damage in the sum of \$15,000. And plaintiff further states that by reason of the aforesaid injuries he has suffered great distress of body and mind, pain, and mental anguish, and has been caused to expend large sums of money for care and medical attention to the amount of \$3,000.

Wherefore, plaintiff prays judgment for the sum of \$18,000 [etc.].

FORM No. 912—Averment of petition for injuries to stock caused by neglect of railroad company to fence its road, as required by general statute.

(In *Missouri Pacific R. Co. v. Metzger*, 24 Neb. 90; 38 N. W. 27.)

[Title of court and cause.]

[After averring incorporation of defendant, ownership and operation of lines, etc.:]

That at a point on its line of railway, not within the incorporated limits of any city, village, or town, or on any public highway, and at a point where it was the duty of the defendant company by force of the statute to erect and maintain a suitable and sufficient fence upon the sides of the defendant's railroad to prevent horses from getting upon said railroad, to wit, [here described by reference to some road-crossing or land, etc.], carelessly and wrongfully did neglect and fail to erect and maintain a suitable and sufficient fence as by law required for said purpose; that by reason of the said neglect and failure of defendant company, its agents, servants, [etc.,] the horses aforesaid, the property of plaintiff, strayed in and upon the track and right of way of the defendant, and while so upon said railroad they were, and each of them was, then and there struck and run over by the locomotive and train of the defendant and killed.

[Followed with averments as to damages thereby sustained, etc.]

[Concluding part.]

FORM No. 913—Against railroad company, for damages for the wanton killing of stock.

(In *Missouri Pacific R. Co. v. Vandeventer*, 28 Neb. 112; 44 N. W. 93.)

[Title of court and cause.]

That plaintiff is a corporation owning, operating, and managing a line of railroad through Richardson County, in this state, and that on the 4th day of February, 1886, while so operating said road, and at a

point thereon between the village of V. and the village of S., and at a point on said road where it was the duty of the defendant to keep its track fenced, defendant had constructed a gate for a private crossing over and upon said track, but had carelessly and negligently allowed said gate to remain unfastened, unsecured, and open, so as to allow free ingress and egress to and from said track; that during the night preceding said day, without the knowledge, fault, or negligence of the plaintiff, three horses, the property of plaintiff, broke out of his enclosure, escaped from his premises, and passed through the said open gate onto the track of defendant, where defendant, by its agents and employees, ran an engine and train of cars over and upon said horses, and killed the same, to the damage of the plaintiff in the sum of \$335.

That said horses were upon the track of defendant in plain view of its agents and employees engaged in running said train, which was moving at a very rapid rate of speed; that said agents and employees negligently, wilfully, and intentionally ran over and upon said horses.

That due notice of said loss was given to defendant by plaintiff prior to bringing this suit.

Wherefore [etc.].

A. B., Attorney for plaintiff.

§ 383. ANSWERS.

FORM No. 914—Defense based upon duty of the plaintiff to make [or maintain] cattle-fences.

[Title of court and cause.]

[After introductory part, and appropriate denials:]

For a separate defense defendant alleges:

1. That on the day of , 19 , the defendant company paid to the plaintiff the sum of \$, a price agreed upon with the plaintiff [or that the same was allowed upon an award for damages for defendant's right of way over plaintiff's land], for making [or maintaining] the fence bordering the said lands of plaintiff and the said tracks of defendant; that it thereby became the duty of the plaintiff to make [or maintain] said fence and keep the same in repair.

2. That plaintiff has not constructed [or maintained] said fence, and, therefore, if plaintiff has suffered any damages by reason of the cattle of plaintiff straying upon the tracks of defendant, such dam-

ages have resulted proximately from plaintiff's own negligence, and not from any negligence of the defendant.

[Concluding part.]

FORM No. 915—Defense based upon trespass by animals.—Action for injuries to stock, alleged to have been killed while on defendant's track.

(In *Missouri Pacific R. Co. v. Metzger*, 24 Neb. 90; 38 N. W. 27.)

[Title of court and cause.]

[After introductory part:]

That at the point where the horses described in the petition of plaintiff got upon the defendant's track the defendant had erected a fence on each side of said track, and thereafter maintained said fence amply sufficient to prevent horses from getting upon said track at said point, and had also constructed and built gates at farm crossings at said point as required by the law of the state as to fencing its tracks and erecting gates at farm crossings; that plaintiff's horses trespassed upon the premises of the adjoining proprietor, upon whose premises a private farm-gate had been erected by defendant, which gate was under the control of the owner of said land, and, without any fault of defendant, its agents or servants, said gate had been left open, and through which open gate plaintiff's horses escaped, and thereby got upon defendant's track, and were injured [etc.].

[Concluding part.]

For the substance of a complaint in an action for damages for personal injuries against a street railway company, the plaintiff being a guest in a wagon which was run into by a car belonging to the defendant, see *Philbin v. Denver City Tramway Co.*, 26 Colo. 331, 85 Pac. 630, 631.

Forms of complaints [or petitions] in actions for damages caused by the destruction of certain property by fire from locomotives, etc.: *Jewett v. Osborne*, 33 Neb. 24, 26, 49 N. W. 774, 775; *Missouri Pacific R. Co. v. Merrill*, 40 Kan. 404, 19 Pac. 793; *Koontz v. Oregon R. & N. Co.*, 20 Ore. 3, 8, 23 Pac. 820.

Form of answer in an action against a railroad company to recover damages caused by fire alleged to have been communicated by an engine, the property of plaintiff: *Missouri Pacific R. Co. v. Cornell*, 30 Kan. 35, 36, 1 Pac. 312, 313.

Form of motion to make more definite and certain: *Fort Scott etc. R. Co. v. Tubbs*, 47 Kan. 630, 631, 28 Pac. 612, 613, (for damages by fire caused by alleged negligence of defendant).

Form of instructions to the jury in an action for damages caused by fire set by sparks from a locomotive: *St. Louis etc. R. Co. v. Hoover*, 3 Kan. App. 577, 43 Pac. 854, 855.

For forms in actions based upon the liability of common carriers of property, see chapter CVII.

For defenses generally in actions for negligence in miscellaneous cases, see chapter CXI, forms 928-930.

§ 384. ANNOTATIONS.

Duties and obligations of common carriers.—The following principles in reference to the duties and obligations of common carriers have been recently expressed in a decision in which a great number of cases bearing upon the points have been exhaustively reviewed. This statement of principles deduced from the cases may aid in determining the questions which must arise in the bringing of actions against common carriers as to the correlative rights and duties between the public and such common carriers. The propositions which seem to be the best-settled law, in the absence of any countervailing statute, are thus expressed by Justice Frick of the supreme court of Utah: "(1) A railroad company in country districts, except at crossings, owes no active duty to keep a lookout for trespassers who may intrude upon its track, and it need not anticipate their presence there. (2) That it owes no duty to such trespasser, old or young, until he is actually discovered in a place of danger; and, in case of an adult, is not liable for injuring him unless such injury is inflicted wilfully or recklessly after his danger is discovered, or in case his position is so prominent and conspicuous that it would amount to wilfulness or recklessness not to discover him and avoid injury; that in case of infants or helpless beings, while there is no active duty required to discover them, yet, when they are discovered, or where their position is such that it would amount to wilfulness or recklessness not to discover their danger, it is the duty of the railroad company after such discovery to exercise all reasonable care, in view of the conditions and circumstances, to avoid injuring them. (3) That a railroad company owes the active duty of exercising ordinary care not to injure persons who are on or near the track at places in thickly settled portions of cities, towns, and villages where persons have free access to the tracks, and at all other places where the public in any considerable numbers habitually have passed over or along the track for a considerable period of time, so as to impart notice of their use of the track to the company, or where the company expressly or impliedly permits persons to pass along or across the track at a particular place or places for a considerable period of time. (4) That when the facts are not in dispute, or where all the facts and inferences that may be deduced from them show that the intrusion in question did constitute a trespass if committed upon real estate generally, then the question is one of law, although the trespass or intrusion was upon a railroad track. In other words, if an intrusion upon real property would be pronounced a trespass as a matter of law, it will likewise be so pronounced if committed on a railroad track, and the court must say, as a matter of law, what duty is imposed upon the owner of the real estate or the railroad company in such a case": *Palmer v. Oregon S. L. Co.*, 34 Utah 466, 98 Pac. 689, 702.

Rule as to right over street railway crossings.—The rights of persons using vehicles and horses on the streets of a city, and street railway companies operating cars on the same streets, are mutual, and such persons and companies are required to use ordinary care and diligence to avoid collisions with each other. It is not negligence for a person to drive across street railway tracks wherever and whenever he may have occasion to do so, and this right of crossing the tracks is not confined to street-cars. The question of negligence in such cases depends upon the proximity or remoteness of the car, its speed, and other circumstances. It is the duty of a traveler to look out for himself, and to exercise such ordinary care as would be exercised by a reasonably prudent person under attendant circumstances. The duty imposed upon persons crossing steam railway tracks to stop, to look, and to listen is not rigidly applied to persons traveling a street used by a street railway: *Philbin v. Denver City Tramway Co.*, 36 Colo. 331, 85 Pac. 630, 631, (for damages for personal injuries caused by negligence of street railway company).

When plaintiff may recover notwithstanding his own negligence.—Plaintiff, though guilty of negligence, may still recover, if after the discovery of his peril the defendant fails to exercise ordinary care to prevent the injury, if in fact such failure of defendant was its proximate or direct cause, and if the defendant was also guilty of

such conduct as implied an intent or willingness to cause the injury: *Denver etc. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582, 585, (alleged wilful negligence of railway company); *Chicago etc. R. Co. v. Crisman*, 19 Colo. 30, 34 Pac. 286, 287; *Denver etc. Rapid Transit Co. v. Dwyer*, 20 Colo. 132, 36 Pac. 1106, 1108, (negligence of street railroad company operating steam motors).

If a motorman sees, or by the exercise of ordinary care and diligence would have seen, a person or vehicle ahead of his car, and through his careless or negligent failure to apply such means as the exigencies of the case required to stop the car, a collision occurs, the company will be liable for the damages occasioned thereby: *Philbin v. Denver City Tramway Co.*, 36 Colo. 331, 85 Pac. 630, 632, (to recover damages for personal injuries caused by negligence of street railway company); citing *Davidson v. Tramway Co.*, 4 Colo. App. 283, 35 Pac. 920, (alleged negligence of street railway company—contributory negligence of defendant); *Clark v. Bennett*, 123 Cal. 275, 278, 55 Pac. 908, (negligence of street railway company); *Denver etc. R. Co. v. Buffehr*, 30 Colo. 27, 69 Pac. 582, 585, (negligence of steam railway company).

CHAPTER CXI.

Miscellaneous Cases of Negligence.

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§ 385. CODE PROVISIONS.**Negligence—Liability in general.**

California, § 1714. Every one is responsible, not only for the result of his wilful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has, wilfully or by want of ordinary care, brought the injury upon himself. The extent of liability in such cases is defined by the title on compensatory relief. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5077. North Dakota, Rev. Codes 1905, § 5392. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 839; Comp. Laws 1909 (Snyder), § 1149. South Dakota, Rev. Codes 1903, C. C. § 1297.

§ 386. COMPLAINTS [OR PETITIONS].

FORM No. 916—For negligent maintenance of electric-light plant and system of wires connected therewith.

(In *Younie v. Blackfoot L. & W. Co.*, 15 Idaho 56; 96 Pac. 193.)

[Title of court and cause.]

[After introductory part, alleging incorporation of defendant company, description and ownership of plant, operation of the same, etc., the complaint sets forth the particular acts of negligence as follows:]

1. That defendant, in conducting its electric-light and electric-power business, had erected a receiving and distributing plant, and had strung poles along the streets and alleys of the village of Blackfoot, and strung along the said poles a system of wires, appurtenances, and appliances charged with a dangerous and life-destroying force and current, known as electricity; that in January, 1895, the defendant corporation, its agents, servants, and employees, negligently and carelessly constructed a system of wires and electric lights in plaintiff's livery barn in said village, for the purpose of lighting said barn, and negligently and carelessly attached said system of wires and lights to said defendant's wires, strung along the streets of said village, and negligently and carelessly failed to exercise and use proper care, diligence, and skill in putting up said plant and selecting material therefor, and in operating, inspecting, and maintaining its plant, wires, and other appurtenances and appliances

and system of wires connected therewith, and dangerously and negligently constructed and put into said plaintiff's livery barn said dangerous and defective system of wires, without proper fuses, or without having the wire therein properly insulated, attached, and fastened, and represented to plaintiff that said system of wires so constructed in said livery barn was safely and properly put in and constructed.

2. That by reason of the defendant, its agents, employees, and servants, failing to use and exercise proper care, diligence, material, and skill in putting in, operating, inspecting, and maintaining its plant, wires, and other appurtenances as aforesaid, defendant did, on the 18th day of January, 1906, and without fault of the plaintiff, negligently and carelessly permit a dangerous, unusual, and excessive current of electricity to pass into and through said defective system of wires in plaintiff's said livery barn, and thereby carelessly, unlawfully, and negligently allowed one of said wires in said barn to become burned, broken, and to fall down in said livery barn, and that while said wire charged with electricity was hanging, and without the fault of or any contributory negligence on the part of plaintiff, said broken and hanging wire came into contact with and struck two horses belonging to plaintiff, and threw said horses to the floor of said barn, killing both of said horses, and tearing and burning the harness thereon, to plaintiff's damage in the sum of \$375; that by reason of the defendant, its agents, servants, and employees, negligently and carelessly permitting said unusual, excessive, and dangerous current of electricity to pass into and through the said system of wires so constructed by defendant in plaintiff's said livery barn as aforesaid, the defendant, its agents, servants, and employees did, on the date aforesaid, negligently, carelessly, and unlawfully, and without fault or any contributory negligence on the part of the plaintiff, burn up, destroy, and completely ruin all of the electric lights and system of wires in plaintiff's barn, to plaintiff's greater and further damage in the sum of \$

[Prayer, etc.]

[Verification.]

G. F. Hansbrough,
Attorney for plaintiff.

FORM No. 917—For damages caused by negligent breaking of a plate-glass window.

(In *Clardy v. Hudspeth*, 89 Ark. 189; 115 S. W. 1134; 21 L. R. A. (N. S.) 702.)

[Title of court and cause.]

[After formal parts, plaintiff alleges:]

That plaintiff was on the 10th day of January, 1907, and ever since has been, the owner of a certain brick building in the town of Nashville, Arkansas, situated on the corner of Main and Clark streets, on lot 4, block 25, which is known as the post-office building; that on the said 10th day of January, 1907, defendant negligently and carelessly walked through and broke one large plate-glass window, then and there permanently set and fixed and annexed to said building and being a part thereof; that said glass window was of the value of \$35; that thereby plaintiff was injured in his property by the defendant, as aforesaid, and to the damage of plaintiff in the said sum of \$35.

[Concluding part.]

J. W. Bishop,
Attorney for plaintiff.

FORM No. 918—For damages for personal injuries.—Negligence in maintaining excavation in highway.

(In *Sanderson v. Billings Water Co.*, 19 Montana 236; 47 Pac. 998.)

[Title of court and cause.]

That during all of the times hereinafter mentioned the defendant was, and still is, a corporation organized under the laws of the state of Montana; that the defendant, on the 21st day of June, 1894, by its agents and servants, wrongfully, carelessly, and negligently excavated a deep and dangerous trench in and across a public street [here named and location of trench described].

2. That said defendant, by its agents and servants, wrongfully, negligently, and carelessly thus obstructing said highway, left a large pile of earth in said road, street, and highway, and negligently suffered said pile of earth dug from said excavation and trench to remain thereon and thereover, obstructing said highway during the night-time of said day; and to remain thereon and thereover openly exposed, and without any protection, fence, light, signal, or anything else to indicate danger or give notice to travelers along said highway against accidents; that by reason of said negligence, careless-

ness, and improper conduct of the defendant, by its said agents and servants, in the night-time of the said day, while the plaintiff was lawfully traveling on said highway and street, the two-wheeled cart of the plaintiff, being then and there driven by plaintiff, with one horse drawing the same, then passing through said street and along and over said road, street, and highway, the plaintiff being then and there wholly unaware of danger, was, without fault or negligence on plaintiff's part, accidentally driven against the said pile of earth, and thereby overturned, whereby the plaintiff sustained great bodily injury, in this, that one of his ankles was dislocated and badly sprained, and is, as he is informed and believes, permanently injured; that he was thereby made sick, sore, and lame, was put to great pain, and was, and is still, prevented from going on with his occupation and business of farming, to his damage in the sum of \$5,000.

Wherefore, plaintiff prays judgment against the defendant for the sum of \$5,000, and costs of this action.

[Verification.]

Gib S. Lane,
Attorney for plaintiff.

FORM No. 919—For negligently managing artificial waterway.

(In Tuolumne etc. Water Co. v. Columbia etc. Water Co., 10 Cal. 194.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff was the owner of a certain valuable water-ditch, for the purpose of conveying water, at which time and place the defendant was also the owner of a certain other water-ditch, for the same purpose.

2. That at said time and place the defendant's ditch was so badly and negligently constructed and managed, and the water therein was so negligently and carelessly attended to, that said ditch broke and gave way, and the water therein flowed over and upon the ditch of the plaintiff, greatly damaging and injuring the same, and carrying down therein and thereon large quantities of rock, stone, earth, and rubbish, and breaking the plaintiff's said ditch, and depriving him of the use and profit of the water flowing therein, to the plaintiff's damage in the sum of \$

[Concluding part.]

FORM No. 920—For negligently causing fire.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff was, and still is, possessed of about acres of land, situate in said county, on which there was an orchard and fences, and also a barn, in which was stored at said time [five] tons of hay.

2. That the defendant on said day intentionally kindled a fire on his land next adjoining the plaintiff's, and near to plaintiff's division fence, and so negligently watched and tended the said fire that it spread to the plaintiff's said land, and consumed said barn and said hay, of the value of \$; and, also, [set out special damages].

[Concluding part.]

FORM No. 921—For negligent navigation of boat.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff owned a certain boat [describing it], of the value of \$, then afloat in the River, near , and loaded with [state what], and the defendant was then and there in the possession of a certain steamboat, called , and had the management and direction thereof.

2. That the defendant, at said time and place, took so little and such bad care of said steamboat, in the direction and management thereof, that the same, by and through his carelessness, negligence, and mismanagement, with great force, ran foul of and struck against the plaintiff's said boat, and thereby broke and greatly damaged the same, and thereby said goods and chattels of the plaintiff, then on board of his said boat, became saturated with water and spoiled.

3. That by reason whereof the plaintiff has been obliged to expend, and has expended, the sum of \$, in and about repairing the damage to said boat, and in replacing or restoring said goods and chattels, and was deprived of the use of said boat for days, to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 922—For injuries to sheep caused by ferocious dog.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That at the time hereinafter mentioned the defendant wrong-

fully kept a dog, well knowing him to be of a ferocious and mischievous disposition, and accustomed to attack and bite sheep [or other animals, as the case may be].

2. That on the day of , 19 , at , the said dog, while in the keeping of the defendant, attacked and bit [or hunted, chased, bit, and worried] the sheep belonging to the plaintiff.

3. That in consequence thereof, the said sheep of the plaintiff, of the value of \$, died, and became of no value to the plaintiff, and the residue of the said sheep of the plaintiff, being also of great value, were injured and rendered of no value to the plaintiff, to his damage in the sum of \$.

[Concluding part.]

FORM No. 923—By guardian ad litem, for damages against owners of vicious animal.

(O'Rourke v. Finch, 9 Cal. App. 324; 99 Pac. 392.)

[Title of court.]

| | |
|--|---|
| John H. J. O'Rourke, a minor, by | } |
| Frank J. O'Rourke, his guardian ad litem, plaintiff, | |
| v. | |
| J. T. Finch, John Doe, and Jane Doe, defendants. | |

Now comes plaintiff, by Frank J. O'Rourke, his guardian ad litem, and complains of defendants, and for cause of action alleges:

1. That on the 24th day of July, 1906, said guardian ad litem filed with said court a verified petition to be appointed the guardian ad litem of plaintiff, who is a minor under the age of fourteen years, and that said petition came on to be heard by said court on the 24th day of July, 1906; that upon the hearing of said petition said court, by its order and decree duly given and made on said date, appointed the said Frank J. O'Rourke the guardian ad litem of the plaintiff to commence and prosecute this action.

2. That the true names of defendants John Doe and Jane Doe are unknown to plaintiff, and for that reason are sued herein under the fictitious names of John Doe and Jane Doe.

3. That at the times hereinafter mentioned defendants kept a vicious and ferocious dog, accustomed to attack and injure persons,

and that defendants well knew said dog to be vicious and ferocious and accustomed to attack and injure persons.

4. That the defendants, while they kept said dog as aforesaid, negligently suffered said dog to go at large without being securely or otherwise guarded or confined.

5. That on the 14th day of June, 1906, on Sixth Avenue, near Pt. Lobos Avenue, in front of the home of the plaintiff, in the city and county of San Francisco, said dog, while in the keeping of defendants, and while at large, and not securely or otherwise guarded or confined, attacked, bit, and wounded plaintiff; that said dog bit and tore the head, ears, and face of plaintiff in such a manner that fifty-two stitches were and had to be taken in the head, ears, and face of plaintiff; that the right ear of plaintiff was by said dog nearly torn from the head of plaintiff, and all to the damage of plaintiff in the sum of \$4,500, all of which was caused by the negligence and carelessness of defendants in permitting and suffering said dog to go at large without being securely or otherwise guarded or confined.

6. That plaintiff, by reason of said injuries as aforesaid, now does suffer, and ever since said injuries were received by him has suffered great pain; that plaintiff will be disfigured and marked for life by reason of said injuries; that prior to the time of his receiving said injuries plaintiff enjoyed the best of health, but that ever since said injuries were received as aforesaid, and as a consequence thereof, plaintiff has been, and now is, sick and in poor health, and he can not rest; that by reason of said injuries plaintiff has been obliged to have a nurse to care for and wait upon him at all times herein mentioned, to the further damage of plaintiff in the sum of \$200; that plaintiff is now indebted in the further sum of \$200 for medical services, which he was obliged to have by reason of said injuries; that plaintiff will be damaged in the further sum of \$100, for medical services to treat the injuries hereinbefore mentioned, in an endeavor to effect a cure thereof.

Wherefore, plaintiff demands judgment against defendants for \$5,000, and costs of suit.

[Verification.]

Don R. Jacks,
Attorney for plaintiff.

FORM No. 924—By next friend, for damages for personal injuries caused by negligent shooting.

(In *Morgan v. Mulhall*, 214 Mo. 451; 114 S. W. 4.)

[Title of court and cause.]

The plaintiff for his cause of action sheweth to the court:

1. That on the 24th day of May, 1905, upon the petition of said Ernest Morgan, the said circuit court did appoint Joseph Morgan as his next friend to commence and prosecute this suit, and said Joseph Morgan has consented in writing to act as such next friend for said purpose.

2. And the plaintiff further sheweth to the court, that on the 18th day of June, 1904, in said city of St. Louis, and on the grounds of the Louisiana Purchase Exposition Company, the defendant, by shooting into a crowd of people negligently, shot the plaintiff, Ernest Morgan, with a pistol; that by said shooting the bowel of plaintiff's abdomen was perforated in front and rear, and plaintiff's hip socket was shattered, and the head of his thigh-bone destroyed; that it was necessary for the surgeon in treating said wounds to cut open plaintiff's abdomen and close the bowel where perforated, and thereafter to cut off and remove the head of said thigh-bone; that, as a further result of said injuries, Bright's disease was developed in plaintiff; that plaintiff's life was saved by his surgeon, but plaintiff suffered on account of said injuries most excruciating pain and anguish of body and mind; that his constitution has been permanently weakened, his leg permanently shortened, and he now suffers, and will continue to suffer, great bodily and mental pain and anguish, all to plaintiff's damage in the sum of \$20,000, for which amount and his costs he asks judgment against the defendant.

Thomas F. Gault,
Attorney for plaintiff.

The petition in form No. 924 was pronounced by the court to be "uncommonly laconic and crisp in its charging part, but it well charges that plaintiff was negligently shot by defendant with a pistol, and that averment charges an actionable wrong. At the very worst, the most that can be said against it is that it is a general charge of negligence. In that case, absent a motion to make more certain and specific, absent any objection to its sufficiency prior to verdict,—as here,—the petition must be held good after a verdict." (The court further on states that the averment is more than a general charge of negligence, and, in the main, commends the pleading as being direct and free from the circumlocution of much of the pleadings in the courts): *Morgan v. Mulhall*, 214 Mo. 451, 114 S. W. 4.

FORM No. 925—For damages caused by waters from roof.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff was lawfully possessed of a dwelling-house and premises, situate in the county aforesaid, and in which the plaintiff and his family then lived.

2. That the defendant wrongfully erected a building near the said dwelling-house of the plaintiff, in so careless and improper a manner that by reason thereof, on said day, and at other times afterwards, and before this action, large quantities of rain-water ran from said building upon and into the said dwelling-house and premises of the plaintiff, and the walls, ceilings, papering, and other parts thereof were thereby wet and damaged, and because thereof plaintiff's said house became unfit for habitation, to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 926—For damages caused by falling snow and ice.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant was the possessor of a building abutting and adjoining Street, which was a public street, in the city of , in front of which building, as part of said street, there was a sidewalk, over which people were accustomed to pass at all hours of the day.

2. That on said day, and before that time, the defendant carelessly and negligently suffered and permitted large masses of snow and ice to accumulate and remain on the roof of said building, so that the same was dangerous to persons passing on said sidewalk, the same being liable to slide therefrom in and upon said sidewalk.

3. That on said day the plaintiff was lawfully passing along on the sidewalk in front of said building, and said snow and ice slid from the roof of said building down and upon the plaintiff, by reason whereof the plaintiff was thrown down upon said sidewalk and greatly injured in [specifying injuries and expenses incurred in their cure, and other special damages], to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 927—For negligent collision with carriage [or automobile].

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff was the owner of a carriage [or automobile], in which carriage [or automobile] he was riding on said day along a public highway in the town of .

2. That the defendant was then possessed of a certain other carriage [or automobile], which was then passing along said highway, then under the care and direction of the defendant [or of the defendant's servant].

3. That the defendant [or his said servant] then and there so carelessly and negligently drove and managed his said horses and vehicle [or so carelessly and negligently managed his automobile] that, by reason of his negligence, the same violently collided with, and struck the plaintiff's carriage and horse [or automobile], and thereby broke and damaged the same [or otherwise describe the accident according to the fact, and state the injuries sustained], to the damage of the plaintiff in the sum of \$.

[Concluding part.]

§ 387. ANSWERS.**FORM No. 928—Defense alleging plaintiff's own negligence.**

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition], and alleges:

Defendant denies that he was guilty of carelessness or negligence, or improper conduct, as in the complaint [or petition] alleged, or otherwise, or at all, and alleges that the injury therein described, if any there was, was caused by the fault and negligence of the plaintiff himself, in this: [Here specify the particulars in which the plaintiff was himself negligent.]

[Etc.]

FORM No. 929—Denial of defendant's ownership of the thing causing injury.

[Title of court and cause.]

[After introductory part:]

Defendant denies that he was at the time of the grievances in the complaint alleged [or at any time or at all] the owner, or in the

possession or control of [here name the thing alleged to have caused the injury].

[Etc.]

FORM No. 930—Denial of plaintiff's ownership of thing injured or destroyed.

[Title of court and cause.]

[After introductory part:]

Defendant denies that plaintiff was at the time of the alleged grievances set forth in the complaint herein [or at any time or at all] the owner, either in whole or in part, of said [here name the thing alleged to have been injured or destroyed].

[Etc.]

Form of petition in an action to recover for injuries suffered by minor child in a room where dangerous machinery was operated by the defendant company, held good on appeal as against a general demurrer, though open to exceptions upon special demurrer: *Poteet v. Blossom O. & C. Co.* (Tex. Civ. App.), 115 S. W. 233, 230.

Form of complaint in an action instituted by the mother, for damages caused by defendant in negligently exposing her son to smallpox, which contagious disease was thereby contracted: See *Franklin v. Butcher* (Mo.), 129 S. W. 428.

Forms of complaints [and petitions] in actions for personal injuries alleged to have been caused by the negligence of defendant: *Behm v. Armour*, 58 Wis. 1, 2, 15 N. W. 806, 807; *Greenberg v. Whitcomb Lumber Co.*, 90 Wis. 225, 63 N. W. 93, 48 Am. St. Rep. 911, 28 L. R. A. 439; *Anderson v. Hayes*, 101 Wis. 538, 539, 77 N. W. 891; *St. Louis etc. R. Co. v. Toomey*, 6 Kan. App. 410, 49 Pac. 819; *Atchison etc. R. Co. v. O'Melia*, 1 Kan. App. 374, 375, 41 Pac. 437; *Hudson v. Wabash W. R. Co.*, 101 Mo. 12, 19, 14 S. W. 15.

Form of petition in an action for damages for the negligent sale of sulphuric acid on application for sulphuric ether: *Fisher v. Golladay*, 38 Mo. App. 531, 535.

§ 388. ANNOTATIONS.—Miscellaneous cases of negligence.

1. Actions for negligence generally.—Essential elements of complaint.
2. Duty of defendant must be shown.
3. Negligence is the ultimate fact to be pleaded.
4. Negligence is the ultimate fact and not a conclusion of law.
5. Complaint in an action for injuries caused by an uninsulated electric wire.
6. Alleging negligence of defendant in maintaining dangerous electric wires.
- 7, 8. For injuries caused by vicious dog.
9. Complaint, when deficient.
- 10, 11. Pleading negligence in general terms.
12. Allegation of negligence in general terms.
13. Specific pleading of negligence.—Doctrine as to.
- 14-16. Allegations specially pleaded must be proved.
17. Effect of pleading specific acts.
18. Damages.—Specific pleading of items.
19. Damages to an infant such as are personal to himself.
20. Defenses.—In general.
21. Contributory negligence.—Nature of defense.
- 22-24. Contributory negligence must be specially pleaded.
25. Insufficient pleading of contributory negligence.
26. Burden of proof as to contributory negligence.
27. Contributory negligence is a matter of defense.

- 28, 29. Contributory negligence.—Conflict of authorities.
 30. Plea of contributory negligence in general terms.
 31. Defense must establish plea.
 32. Failure to submit evidence in support of defense.
 33. When plaintiff waives pleading of defense.
 34. Defense of due performance of duty.
 35. Trial and proof.—Negligence as a question of fact.
 36. Physical examination of plaintiff by defendant's physicians.
 37. Right to present evidence under averment of legal conclusion where no objection is made to the pleading.

1. ACTIONS FOR NEGLIGENCE GENERALLY.—Essential elements of complaint.—A complaint in an action for negligence must state facts to meet three essential elements,—namely, a duty or obligation which the defendant is under to protect the plaintiff from injury; a failure to discharge that duty; and injury resulting from the failure. Not only must the complaint disclose these essentials, but the evidence must support them, and the absence of proof of any of them is fatal to a recovery: *Means v. Southern California R. Co.*, 144 Cal. 473, 77 Pac. 1001, 1 Am. & Eng. Ann. Cas. 206, 207, and cases enumerated in note, 1 Am. & Eng. Ann. Cas. 209, 210.

2. Duty of defendant must be shown.—In pleading negligence arising from the wrongful conduct of another, it is essential that the petition shall contain an allegation of duty owing by the defendant to the plaintiff, or facts and circumstances from which such duty can be inferred, and a failure in the performance of an imperfect performance of such duty by the defendant, and that such failure or breach of duty was a material and proximate cause of the injury and damage to the plaintiff: *Poteet v. Mossom O. & C. Co.* (Tex. Civ. App.), 113 S. W. 289, 290, (by father of minor of the age of four and one-half years to recover for injuries sustained by the child in a mill and seed-room where dangerous machinery was operated).

3. Negligence is the ultimate fact to be pleaded, and it forms part of the act from which an injury arises. It is absence of care in the performance of an act, and is not merely the result of such absence, but the absence itself: *Stephenson v. Southern Pacific Co.*, 102 Cal. 143, 148, 34 Pac. 618, 36 Pac. 407, (negligence of railroad company in backing train into street-car).

4. Negligence is the ultimate fact, and Jury's Pl.—98.

not a conclusion of law: *House v. Meyer*, 100 Cal. 592, 593, 35 Pac. 308.

5. The complaint in an action for injuries caused by an uninsulated electric wire was held sufficient where it set forth, substantially: That the defendant was engaged in the operation of machinery and apparatus for producing electricity and supplying it to dwelling-houses in the city of Denver; that it had extended its wires to the house of Charles W. Walters, the father of the plaintiff, for the purpose of supplying light to that house; that it had attached to the house near to, and directly under the window, an electric device called a converter, and near to and above the converter, and directly under the window, had placed two iron supports to hold glass insulators, to which were attached wires, connected with the house and conveying the electric current for furnishing light to the house; that the defendant had carelessly suffered the wires to become uncovered and uninsulated; that the plaintiff, a child of twelve years of age, who was residing with his father, upon looking out of the window, and seeing that one of the insulators had been removed from its iron support, and knowing nothing of the danger incident to his coming in contact with the wire attached to the insulator, seized hold of the insulator, for the purpose of replacing it upon its support, and received a charge of electricity from the naked wire, which his hands touched in seizing the insulator, resulting in serious and permanent injury to him, etc.

The complaint in which the foregoing facts constituted the charge of negligence was objected to on the grounds,—first, that the facts alleged do not constitute negligence on the part of the defendant within the contemplation of the law; second, that the complaint shows that the proximate cause of the injury

was the act of the plaintiff in seizing the insulator, and not the exposed condition of the wire; and third, that it appears upon the face of the complaint that the plaintiff was guilty of negligence contributing to his injury. The complaint as to the first objection was held sufficient where it could not be said, as a matter of law, that proof would be admissible under its averments which would justify a verdict that in leaving the wire exposed as alleged the defendant was guilty of negligence. As to the second and third objections, the court stated that the question of the legal effect of the plaintiff's act in reaching out to the wire was in no manner connected with the question of proximate cause, but must be considered only in an examination of the charge of contributory negligence, of which it can not be said that the statements of the complaint, as a matter of law, showed the plaintiff guilty: *Walters v. Denver Cons. Electric Light Co.*, 12 Colo. App. 145, 54 Pac. Rep. 960, 961; s. c. 39 Colo. 101, 89 Pac. 815, 816.

6. **Alleging negligence of defendant in maintaining dangerous electric wires.**—For a complaint in an action by an administrator for wrongful death of his decedent, held sufficient as showing employment of the deceased by the defendants, and also as stating facts sufficient to show that the proximate cause of the injury was due to conditions of which the defendants had knowledge, and of which they failed to inform the deceased, although the court says the allegations are not as definite, certain, or specific as they should have been made, see *Poor v. Madison R. P. Co.*, 38 Mont. 341, 99 Pac. 947. (As against a general and special demurrer filed, however, the complaint was upheld.)

7. **For injuries caused by vicious dog.**—Judgment was recovered in the trial court, and affirmed on appeal, upon a complaint alleging personal injuries caused by the bite of a vicious dog, the allegations being in substance as follows: That on and prior to July 19, 1903, the defendant, W. D. Hofus, was the owner of a bulldog known to him to be vicious, dangerous, and ferocious; that said Hofus kept said dog on the premises claimed by him, on the tide flats in the city of Seattle; that across said

premises there was a right of way, commonly used by the public generally, with the knowledge and consent of defendant; that on the 19th day of July, 1903, while plaintiff was wholly on said right of way, going to his regular work, said dog, without any cause therefor, "ferociously, viciously, and maliciously bit and lacerated the plaintiff's left leg, causing the plaintiff great pain," etc.: *Grissom v. Hofus*, 39 Wash. 51, 80 Pac. 1002, 4 Am. & Eng. Ann. Cas. 125.

8. As to the knowledge of the owner of the viciousness of an animal required to be alleged and proved, see the authorities in the note to *Grissom v. Hofus*, 39 Wash. 51, 80 Pac. 1002, in 4 Am. & Eng. Ann. Cas. 127.

9. **Complaint, when deficient.**—A complaint is deficient in an action to recover for damages for personal injury resulting from the negligence of defendant, where it fails to show the facts wherein the defect consisted and the causal connection between the defective place and the injury, and where such complaint further fails to show that the defendant had knowledge of the efficient cause of the injury, or, by the exercise of reasonable diligence, ought to have had that knowledge: *Fearon v. Mullins*, 35 Mont. 232, 88 Pac. 794, 795, (for damages for personal injuries—negligent maintenance of a defective porch, resulting in serious injuries to servants).

10. **PLEADING NEGLIGENCE IN GENERAL TERMS.**—Negligence may be pleaded in general terms without specifying the acts constituting the negligence under the law, in some jurisdictions, but if the plaintiff attempts to specify the negligence of the defendant, he is confined in his proof to the negligence, as specified, and can not recover upon any other ground: *Lexington R. Co. v. Britton*, 130 Ky. App. 676, 114 S. W. 295, 297; *Gaines & Co. v. Johnson*, 32 Ky. Law Rep. 58, 105 S. W. 381.

11. It is sufficient to allege negligence in general terms, specifying, however, the particular act which is alleged to have been negligently done: *McGehee v. Schiffman*, 4 Cal. App. 50, 87 Pac. 290, 291, (action to recover for negligence of dentist).

12. **Allegation of negligence in general terms.**—Where no question of the sufficiency of the pleading was raised dur-

ing the trial, and no motion made to make the complaint more specific, it has been held that the question of the sufficiency of the pleading as to allegations of negligence generally can not be raised on appeal for the first time, and that such allegations are sufficient to support the judgment. The portion of the complaint alleging negligence was as follows: That the defendant "did negligently and carelessly furnish the plaintiff and other employees with dangerous, defective, and improper tools and appliances with which to perform the work, and negligently failed and neglected to warn or instruct the plaintiff or other servants of the hazards and dangers of the work. * * * And said defendants and each of them then and there, otherwise so negligently, carelessly, and recklessly conducted themselves, and were guilty of such carelessness and negligent acts, omissions, and conduct, that by reason thereof, and by reason of all the aforesaid negligent, reckless, and careless acts and omissions of the defendants, and each and every of them, this plaintiff was suddenly caused to lose his footing, and his feet were caused to be thrown from under him, and he was suddenly and violently thrown and caused to fall," etc.: *Christiansen v. Chicago etc. R. Co.*, 107 Minn. 341, 120 N. W. 300, 301. See *Clark v. Chicago etc. R. Co.*, 28 Minn. 69, 9 N. W. 75.

13. SPECIFIC PLEADING OF NEGLIGENCE.—Doctrine as to.—Where the plaintiff pleads negligence specifically, a recovery, if any is had, must be upon the specific acts alleged; but this is not true where the petition alleges general negligence. The case then falls within the doctrine of *res ipsa loquitur*: *Price v. Metropolitan S. R. Co.*, 220 Mo. 435, 119 S. W. 932, 937, 132 Am. St. Rep. 588.

14. Allegations specially pleaded must be proved.—Where negligence is specified in a petition as a cause of action, the pleaded specifications must be substantially proved as alleged, or some one out of the several specifications constituting the cause of action must be proved as alleged in order to recover: *Newlin v. St. Louis etc. R. Co.*, 222 Mo. 375, 121 S. W. 125, 130; *Evans v. Wabash R. Co.*, 222 Mo. 435, 121 S. W. 36, 42; *Brown v. Chicago etc. R. Co.*, 59 Kan.

70, 52 Pac. 65; *Telle v. Leavenworth etc. R. Co.*, 50 Kan. 455, 31 Pac. 1076.

15. If the plaintiff by his petition is shown to be so sufficiently advised of the exact negligent acts causing or contributing to his injury as to plead them specially, then the reason for the doctrine of presumptive negligence has vanished. If he knows the negligent act,—and he admits he does so know it by pleading it in his petition,—then he must prove it, and if he recovers, it must be upon the negligent acts pleaded, and not otherwise: *Evans v. Wabash R. Co.*, 222 Mo. 435, 121 S. W. 36, 42, quoting from *Roscoe v. Metropolitan St. R. Co.*, 202 Mo. 576, 101 S. W. 32.

16. The very act of negligence pleaded must be proven if a specific act is alleged: *Gardner v. Metropolitan etc. R. Co.*, 223 Mo. 389, 122 S. W. 1068, 1077, and cases cited.

17. Effect of pleading specific acts.—Charging specific acts of negligence relied upon for a recovery is equivalent to stating that there are not other acts of the company which caused or contributed to the injury; and if, after stating his cause of action, the plaintiff is permitted to introduce evidence of, and recover upon, another and different cause not stated in the petition, the defendant would thereby be taken by surprise, and would not be prepared to meet the new issues thus presented: *Beave v. St. Louis Transit Co.*, 212 Mo. 331, 111 S. W. 52; *Evans v. Wabash R. Co.*, 222 Mo. 435, 121 S. W. 36, 42.

18. DAMAGES.—Specific pleading of items.—The following averments in a complaint specifically pleading items of damages claimed are held to be sufficient: "Chattels and effects lost and destroyed by the sinking of a boat, \$381.65; expenses incurred and paid out for raising the boat, \$544.85; loss of profits and earnings of boat and pile-driver for twenty-seven days while out of use and being raised and repaired, at \$25.00 per day, \$675.00; special injury and damage to boiler caused by collision, \$100.00": *Carscallen v. Coeur d'Alene etc. T. Co.*, 15 Idaho 444, 98 Pac. 622.

19. Damages to an infant such as are personal to himself may be recovered, notwithstanding a recovery by his parent for any damages the latter has sus-

tained: *Durkee v. Central Pacific R. Co.*, 56 Cal. 388, 38 Am. Rep. 59.

20. **DEFENSES.**—In general.—In actions of negligence, many defenses, according to the facts, are open to the defendant. He may plead, first, a general denial; second, a plea of contributory negligence of the plaintiff; or third, in case of an action for wrongful death of the decedent, that if the plaintiff (or decedent) was injured by the negligence of any one other than himself, it was that of persons who were fellow-servants, and such risk was assumed; fourth, where the laws of a state provide the giving of a notice of such injury, in writing, within a specified time, stating the time and place thereof, and where not given, the defense should so allege; fifth, a general assumption of risk upon the part of the plaintiff (or decedent); sixth, where the facts warrant that defendant's liability, if any, depends upon and is to be determined by the law of another state (as, for example, where the injury resulting was suffered in one state and the action was brought in another). For a case embodying these defenses, see *Newlin v. St. Louis etc. R. Co.*, 222 Mo. 375, 121 S. W. 125, 126.

21. **Contributory negligence.**—Nature of defense.—Contributory negligence is a plea in the nature of a plea of confession and avoidance. It carries the idea that a cause of action would exist in favor of the plaintiff but for the fact that negligence of the plaintiff co-operated with that of defendant to produce the injury. Necessarily, it is an affirmative defense, and the burden is on the defendant to plead and prove it if he would receive its benefits. An exception to this rule applies to cases where the evidence introduced by the plaintiff shows that his own negligence co-operated with the negligence of defendant to cause the injury. In such instances, the defendant is entitled to receive the benefit of the defense, regardless of whether or not it was pleaded in the answer; but in all other cases the defense is waived if not pleaded: *Allen v. Transit Co.*, 183 Mo. 411, 81 S. W. 1142; *Kaminski v. Iron Works*, 167 Mo. 462, 67 S. W. 221; *Ramp v. Metropolitan Street R. Co.*, 133 Mo. App. 700, 114 S. W. 59, 61.

22. **Contributory negligence must be specially pleaded.**—Contributory negligence, if depended upon by the defendant as a defense, must be pleaded: *St. Louis etc. R. Co. v. Philpot*, 72 Ark. 23, 77 S. W. 901; *St. Louis etc. R. Co. v. Grimsley*, 90 Ark. 64, 117 S. W. 1064, 1066.

23. The plaintiff in an action for damages for negligence of the defendant is not required to allege that he, or the person for whose injury or death he seeks redress, was free from contributory negligence: *Poor v. Madison R. P. Co.*, 38 Mont. 341, 99 Pac. 947, 954. For this is a matter of defense: *Schroder v. Montana Iron Works*, 38 Mont. 474, 100 Pac. 619, 620, citing *Cummings v. Helena etc. R. Co.*, 26 Mont. 434, 68 Pac. 852.

24. Where neither the pleading nor the evidence of the plaintiff develops contributory negligence, it must be pleaded to become available as a defense: *Missouri etc. R. Co. v. Watson*, 72 Tex. 633, 10 S. W. 731; *Murray v. Gulf etc. R. Co.*, 73 Texas 6, 11 S. W. 125; *Perez v. San Antonio etc. R. Co.*, 28 Tex. Civ. App. 255, 67 S. W. 137; *Lewis v. Texas etc. R. Co.* (Tex. Civ. App.), 122 S. W. 605, 606; *Cahill v. Stone & Co.*, 153 Cal. 571, 96 Pac. 84, 87.

25. **Insufficient pleading of contributory negligence.**—Contributory negligence of the plaintiff is not pleaded in an answer in an averment reading: "If plaintiff received any injuries, . . . the same were caused by plaintiff's own fault and negligence,"—for it is held that this is a statement to the effect that the negligence of plaintiff was the sole cause of her injury. This is not equivalent to an allegation that such negligence contributed with the negligence of the defendant to the production of the injury. The defense it attempts to raise is one the defendant had the right to offer, under a general denial, since it in no sense partook of the nature of a plea of confession and avoidance, but directly negatived the very existence of the cause of action: *Ramp v. Metropolitan S. R. Co.*, 133 Mo. App. 700, 114 S. W. 59, 61.

26. **Burden of proof as to contributory negligence.**—Contributory negligence is a defense to be affirmatively established by the defendant, unless it is shown or can

be inferred from the evidence given in support of the plaintiff's case. It is therefore incumbent upon the defendant to plead the same by his answer, if he desires to avail himself of such defense, and if he fails to so plead, no finding in relation to contributory negligence is required: *Kenny v. Kennedy*, 9 Cal. App. 350, 99 Pac. 384; *Green v. Southern Pacific Co.*, 132 Cal. 254, 64 Pac. 255; *Cahill v. Stone & Co.*, 153 Cal. 571, 96 Pac. 84, 19 L. R. A. (N. S.) 1094; *Birsch v. Citizens' Electric Co.*, 36 Mont. 574, 93 Pac. 940; *Smith v. Ogden etc. R. Co.*, 33 Utah, 129, 93 Pac. 185.

27. Contributory negligence is a matter of defense, to be proved affirmatively by the defendant, and hence the burden of proof of such defense is on him: *Robinson v. Western Pacific R. Co.*, 48 Cal. 409, 426 (for personal injuries—negligence of street railway company); *McQuilken v. Central Pacific R. Co.*, 50 Cal. 7, 8, (for injuries to infant passenger—negligence of steam railroad company); *Nehrbas v. Central Pacific R. Co.*, 62 Cal. 320, 324, (by parent for damages for loss of five minor children—negligence of steam railroad company at crossing); *MacDougall v. Central Pacific R. Co.*, 63 Cal. 431, 434, (for personal injuries to passenger suffered while in act of alighting—negligence of steam railway company); *Yik Hon v. Spring Valley Water Works*, 65 Cal. 619, 620, 4 Pac. 666, (damages for injuries to property—negligent maintenance of defective water-pipes); *Magee v. North Pacific Coast R. Co.*, 78 Cal. 430, 433, 21 Pac. 114, 12 Am. St. Rep. 69, (for personal injuries to servant—negligent maintenance of defective fence and cattle-guard); *House v. Meyer*, 100 Cal. 592, 593, 35 Pac. 308, (damages for negligence).

28. Contributory negligence. — Conflict of authorities.—In many jurisdictions it is the rule that contributory negligence is a matter of defense, and that the burden of establishing it is upon the defendant. Where this rule obtains, the plaintiff has made his case when he has shown injury to himself, and negligence on the part of the defendant which was the proximate cause of it. It then devolves upon the defendant to allege and prove contributory negligence as matter of defense, the presumption being in favor of the plaintiff, that he was at the time of

the accident in the exercise of due care, and that the injury was caused wholly by the defendant's negligent misconduct. This is the doctrine of the supreme court of the United States, and it is the rule in Alabama, California, Georgia, Kentucky, Kansas, Maryland, Minnesota, Missouri, New Hampshire, New Jersey, Nebraska, Ohio, Oregon, Pennsylvania, Rhode Island, South Carolina, Texas, Wisconsin, West Virginia, Vermont, and Colorado, as well as in England.

29. The rule in some jurisdictions is that the burden is upon the plaintiff in these actions to show his own freedom from contributory negligence. The authorities in Massachusetts, Maine, Louisiana, North Carolina, Michigan, Illinois, Connecticut, Iowa, and Indiana support this latter doctrine. In a recent decision in the supreme court of Idaho, the doctrine that contributory negligence is a matter of defense, and that the burden of establishing it is upon the defendant, is favored: *Crawford v. Bonner's Ferry L. Co.*, 12 Idaho 678, 87 Pac. 998, 1000, 10 Am. & Eng. Ann. Cas. 1.

30. A plea of contributory negligence in general terms, like a plea of negligence in general terms, is good after verdict: *Gardner v. Metropolitan etc. R. Co.*, 223 Mo. 389, 122 S. W. 1068, 1076.

31. Defense must establish plea.—Contributory negligence is a matter for the defense to allege and establish: *Northern Pacific R. Co. v. Hess*, 2 Wash. 383, 26 Pac. 866, 867. See *Hocum v. Weitherrick*, 22 Minn. 152; *Kansas etc. R. Co. v. Pointer*, 14 Kan. 37.

32. Failure to submit evidence in support of defense.—As contributory negligence is a defense which, if established, defeats the plaintiff's action, the plaintiff can not complain where the court fails to submit evidence in support of such defense to the jury: *Haralson v. San Antonio T. R. Co.* (Tex. Civ. App.), 115 S. W. 876.

33. When plaintiff waives pleading of defense.—As to whether contributory negligence is an affirmative defense, to be specially pleaded, or whether evidence thereof may be given under a general denial, not decided; but where, on the trial, evidence as to contributory negligence was given without objection, held that an objection, made later, on the ground that such negligence was not

pleaded, if such be an objection, was waived by the defendant: *Woodruff v. Bearman F. Co.*, 108 Minn. 118, 121 N. W. 426, 427.

34. Defense of due performance of duty must appear either by a direct traverse of plaintiff's case as to the fact of injury or by the proof that the injury occurred without defendant's particular fault: *Wilson v. California C. R. Co.*, 94 Cal. 166, 170, 29 Pac. 861, 17 L. R. A. 685.

35. TRIAL AND PROOF.—Negligence as a question of fact.—The question of negligence is, in general, a question of fact, and not of law, and the verdict of the jury, or finding of the lower court, can not be disturbed unless the lack of negligence on the part of the defendant or the existence of contributory negligence on the part of the plaintiffs follows necessarily as a conclusion of law from the undisputed facts: *Schneider v. Market Street R. Co.*, 134 Cal. 482, 488, 66 Pac. 734, (negligence of street railway company); *Brown v. Los Angeles R. Co.*, 2 Cal. App. 618, 621, 84 Pac. 362, 88 Pac. 1135. And as to the contrary doctrine, see authorities cited in the same case.

36. Physical examination of plaintiff by defendant's physicians.—For authorities holding that the trial court has a right, in its discretion, to make an order requiring the plaintiff to submit to an examination at the hands of defendant's physicians, see *Murphy v. Southern Pacific Co.*, 31 Nev. 120; 101 Pac. 322, 331.

37. Right to present evidence under averment of legal conclusion where no objection is made to the pleading.—In an action to recover damages for personal injuries alleged to have been received by the plaintiff as the result of a collision with a street-car, the plaintiff in his petition alleged the fact that the speed was in violation of an ordinance in such a manner as rendered it a statement of a mere conclusion of law; nevertheless, if no objection be made to the pleading, the court may permit evidence under the averment which would have been competent had the pleading been made more specific, as it might well have been had objection thereto been urged at the proper time: *Doherty v. Des Moines C. R. Co.* (Iowa), 121 N. W. 690, 694.

TITLE XIV.

Actions for Wrongs.

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CHAPTER CXII.

Slander of Title.

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§ 389. COMPLAINT [OR PETITION].

FORM No. 931—For slander of title. (Common form.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That plaintiff was on the day of , 19 , and ever since has been, the owner in fee of a tract of land situate in the county of , in this state, bounded and described as [here describe]; that on said date, and while he was so the owner thereof, plaintiff caused said land to be offered and exposed for sale at public auction on said day of , 19 .

2. That the defendant, well knowing the premises, maliciously, and without probable cause, and to cause it to be suspected that plaintiff could not give a good title to said land, and to prevent

plaintiff from effecting a sale thereof, did then and there publicly say, in the presence and hearing of [here name the person or persons], and of other persons then and there assembled for the purpose of bidding on said property and buying the same, concerning plaintiff and his said property, the defamatory matter, namely: [Set forth exact words uttered, or substantially as uttered.]

3. That said defamatory matter was and is false and malicious, and was and is known by defendant to be false.

4. That by reason of the utterance of said false and defamatory words said and [naming the persons], who attended at said auction sale for the purpose of then and there bidding for and buying said land, were, and each of them was, dissuaded and prevented from bidding for the same, and refused, and still refuse, to purchase the same; that the plaintiff, by reason of the said acts and words of defendant, has been unable to sell said land, and has been injured by the aforesaid acts of the defendant, in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for \$, and for costs of this action.

[Verification.]

A. B., Attorney for plaintiff.

§ 390. ANNOTATIONS.—Slander of title.

1. Essentials of an action for slander of title.
2. Interest of plaintiff must be shown.
3. Malice and want of probable cause.
- 4, 5. Complaint must show special damages.
6. Damages must result from slanderous statement.
7. Where contract is binding upon intending purchaser.
8. Repetition of defamatory words by third person.

1. Essentials of an action for slander of title.—In order to maintain an action for slander of title the plaintiff must show (1) he possesses an estate or interest in the property, (2) falsehood and malice in the utterance of slander concerning it, and (3) a pecuniary injury or damage to plaintiff.

It is necessary to establish that the words spoken were false, and were maliciously spoken by the defendant, and also that the plaintiff has sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff has sustained damage; and as special

damage is the only ground upon which the action can be maintained, it is essential that such damage be distinct and particularly set out in the complaint: *Edwards v. Burris*, 60 Cal. 157, 161; *Burkett v. Griffith*, 90 Cal. 532, 537, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707, and note.

2. Interest of the plaintiff in the premises must be shown from the petition; otherwise, it is deficient: *Stark v. Chitwood*, 5 Kan. 141, 145.

3. Malice and want of probable cause must be averred to sustain the action: *Stark v. Chitwood*, 5 Kan. 141.

4. Complaint must show special damages.—In order to maintain the action for slander of title, it is necessary to establish that the words spoken were

false, and were maliciously spoken by the defendant, and also that the plaintiff had sustained some special pecuniary damage as the direct and natural result of their having been so spoken. As words spoken of property are not in themselves actionable, it is necessary to allege the facts which show wherein the plaintiff sustained damage; and as special damage is the only ground upon which the action can be maintained, it is essential that such damage be distinctly and particularly set out in the complaint: *Burkett v. Griffith*, 90 Cal. 532, 537, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707, citing *Linden v. Graham*, 1 Duer (N. Y.) 670; *Swan v. Tappan*, 5 Cush. 104.

5. Special damages constitute the gist of an action in the nature of one for slander of title; therefore, where the complaint is deficient in alleging such damages, it is demurrable: *Wilson v. Dubois*, 35 Minn. 471; 29 N. W. 68; 59 Am. Rep. 335.

6. Damages must result from slanderous statement.—The utterance of a mere falsehood, however malicious, will not sustain the action unless damage has resulted therefrom, and the damage which can be recovered is only such as is the direct and natural result of the utterance of the words. Therefore,

where a complaint fails to show that the statements and declarations alleged to have been made by the defendant could have caused any damage to the plaintiff, a demurrer thereto is properly sustained: *Burkett v. Griffith*, 90 Cal. 532, 541, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

7. Where contract is binding upon intending purchaser.—Where the complaint shows upon its face that the intending purchaser is still bound by the contract to purchase, such complaint fails to show that the plaintiff has sustained any damage: *Burkett v. Griffith*, 90 Cal. 532, 540, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707.

8. Repetition of defamatory words by third person.—The originator of defamatory words respecting plaintiff's title is not liable for subsequent repetition of those words by another without his direction or authority: *Burkett v. Griffith*, 90 Cal. 532, 542, 27 Pac. 527, 25 Am. St. Rep. 151, 13 L. R. A. 707, citing *Parkin v. Scott*, 1 Hurl & N. (Eng.), 153; *Ward v. Weeks*, 7 Bing. (Eng.) 211; *Terwilliger v. Wands*, 17 N. Y. 54; 12 Am. Dec. 420; *Gough v. Goldsmith*, 44 Wis. 262, 28 Am. Rep. 579; *Hastings v. Stetson*, 126 Mass. 329, 30 Am. Rep. 683; *Crain v. Petrie*, 6 Hill, 522, 41 Am. Dec. 765.

CHAPTER CXIII.

Unlawful Monopolies and Conspiracies.

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§ 391. COMPLAINTS [OR PETITIONS].

FORM No. 932—For damages for conspiracy to injure business.

(In *Ertz v. Produce Exchange*, 79 Minn. 140; 81 N. W. 737; 79 Am. St. Rep. 433; 48 L. R. A. 90.)

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That plaintiff is now, and for two and a half years past has been, engaged at the city of M. in the business of a commission merchant, buying and selling farm produce and commodities.
2. That his profits from his business prior to the committing of the wrongs hereinafter stated by the defendants were \$20,000 per year; that to enable him to conduct his business it has been and it is necessary for him to buy such farm produce and commodities at M. and resell the same to his customers.
3. That defendants during the time the plaintiff has so conducted his business were, and still are, engaged in buying and selling farm produce and commodities, and they are practically all the persons, firms, and corporations who are engaged in such a business in the city of M., and during such time they have controlled, and still do control, regulate, and govern the quantity and price of such farm produce and commodities and the purchase and sale thereof.
4. That plaintiff, prior to July 19, 1899, was accustomed to and did purchase the product and commodities so dealt in by him from the

defendants, and paid them therefor in full; but on the day above named and at various subsequent times the defendant The Produce Exchange conspired, confederated, and agreed to and with the other defendants herein not to sell to or to buy of the plaintiff any farm produce or commodities for the purpose of carrying on his business.

5. That the defendant The Produce Exchange then and there did maliciously solicit and procure from all of its co-defendants and each of them, and from many other persons to the plaintiff unknown, an agreement not to sell to or buy from plaintiff such products and commodities, and did so induce its co-defendants and each of them and other persons, by the aid of and through the influence of all the defendants, not to sell to or buy of the plaintiff any such products and commodities for the purpose of his business or otherwise.

6. That in pursuance of such conspiracy each and all of the defendants have, with such malicious and unlawful intent, since July 19, 1899, refused so to sell to or buy of the plaintiff, and have daily circulated among and reported to the patrons of the plaintiff that he was unable to buy such products and commodities, with the intent of inducing such patrons to discontinue doing business with the plaintiff.

7. That the business of the plaintiff by reason of the premises has been ruined, and he has been damaged in the sum of \$25,000.

[Concluding part.]

FORM No. 933—For damages for conspiracy to injure business of a butcher.

(In *Delz v. Winfree*, 80 Tex. 400; 16 S. W. 111; 26 Am. St. Rep. 755.)

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

That plaintiff at the time hereinafter stated was pursuing the occupation of a butcher in the city of Galveston, and was making, and would have continued to make, large profits and gains in the business, but for the grievances committed by the defendants as hereinafter alleged; that in the prosecution of his business he had opened and was conducting two butcher-shops in said city for the sale of different kinds of fresh meat; that it became necessary that he should buy live animals suitable and fit to be slaughtered for the purposes of his business as a butcher, and for a long time before and at the time of the commission by the defendants of the grievances herein stated he was engaged in the business of buying live animals suitable

and fit to be slaughtered and sold as fresh butchers' meat, and which he slaughtered and sold as such at his said two butcher-shops; that the persons from whom the plaintiff bought said live animals were engaged in the business of transporting to Galveston, and receiving for sale live animals suitable and fit to be slaughtered and sold as butchers' meat, and in selling such live animals for such purposes to whomsoever would buy; that long before and at the time of the commission of the wrongs herein charged the defendants W. N. & P. and B. & B. were engaged as separate firms in said business of receiving and selling live animals for the purpose aforesaid on Galveston Island, and were, and are now, the only persons or association of persons so engaged in said business in Galveston County; that without justifiable cause and unlawfully, and with the malicious intent to molest, obstruct, hinder, and prevent plaintiff from carrying on his said business and making a living thereby, the said W. N. & P., on or about the 1st day of July, 1889, and at divers times thereafter, and until the filing of this petition, did combine, confederate, and conspire with the said firm of B. & B., and with one G. B., a butcher, not to sell to petitioner for cash any live animals or slaughtered meat for the purpose or for the prosecution of his said business; that the said W. N. & P. solicited and procured from said B. & B. not to sell any live animals to plaintiff, and did so induce said G. B., and others to plaintiff unknown, not to sell to him slaughtered meat for the purpose of his business; that in pursuance of said combination each of said firms refused to sell plaintiff live animals when he applied to them to purchase at their own price, in money which he then offered to pay them, and that said G. B. likewise refused to sell him slaughtered meat; that by reason of such unlawful combinations and malicious interference with his business, plaintiff was compelled to close up and discontinue his business in one of his shops, and in order to continue it at the other of his shops, he has been, and is now, forced to buy slaughtered meat at a great disadvantage and at higher prices than he would have had to pay but for the aforesaid unlawful combination and malicious interference with and hindrance of his business by defendants. [Averment as to damages, etc.]

[Concluding part.]

**FORM No. 934—Averment of damages for conspiracy of wholesale merchants
in restraint of trade.**

(In *Hawarden v. Youghioghenny etc. Coal Co.*, 111 Wis. 545; 87 N. W. 472; 55 L. R. A. 828.)

[Title of court and cause.]

[After introductory part, and facts of conspiracy of wholesalers, the damages to the plaintiff are averred as follows:] * * * that plaintiff, E. H., in September, 1898, purchased a two-thirds interest in the established coal business of J. B. C. and wife at Superior, and all the teams, tools, office, and appliances used by said C. and wife in that trade; that C. and wife had an established retail trade in coal, based upon the right of any person to go into business and to buy of the wholesalers at the market price for retail; that H. and C. carried on the business until June, 1900, when H. bought out C., and the good-will of the business; that the profits of their business during the seasons from September to June were \$40 a month, and that the profits from September, 1900, to April 1, 1901, would have been \$55 a month; that as the result of said conspiracy plaintiff, H., was forced out of the business and his trade destroyed, and he thereby suffered damages in the sum of \$500.

[Concluding part.]

§ 392. ANSWER.

FORM No. 935—Defense averring right to regulate the business of defendants to prevent ruinous competition of rates, in action for alleged conspiracy of underwriters.

(In *Continental Ins. Co. v. Board of Underwriters of the Pacific*, 67 Fed. (C. C.) 310.)

[Title of court and cause.]

[After introductory part, denials of formation of conspiracy among underwriters, etc.]

1. Defendants allege that said board of underwriters was created for, and its object is, to regulate the business of its members, and to prevent, whenever possible by arrangement between themselves, a ruinous competition of rates, and that they, in common with other companies, have attempted, and do attempt, to obtain business for their respective offices, and seek to obtain business which is placed in other offices, and that such conduct is now and always has been followed by the plaintiff. * * *

2. Defendants aver that they have done no act, and do not contemplate any act, which will damage the plaintiff other than such as may arise from competition, and that the acts of the defendants have been done as individuals to protect respectively their business against competition offered, and have not been done under any conspiracy or combination whatsoever; that the object of their association is to promote the safety and success of their business; that it is voluntary and is not designed to admit or exclude from its membership the plaintiff or any person or to compel it or other companies to join the same.

[Concluding part.]

For form of an information in the nature of quo warranto by a state in an action instituted to obtain the forfeiture of a charter and to revoke the license of a foreign corporation to do business where the said corporation is alleged to have entered into an unlawful trust and combination against the laws of the state, prohibited by what is known as the anti-trust statutes, see *State ex inf. Hadley, Attorney-General, v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, 907-912.

For form of judgment and decree under anti-trust statutes dissolving an unlawful conspiracy and enjoining the continuance thereof, see *State ex inf. Hadley, Attorney-General, v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, 1052, set out in the dissenting opinion in the reported case.

For form of findings of fact and conclusions of law reported to the court on a legal proceeding in the nature of quo warranto under the "anti-trust statutes," see *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, 981-1005.

For illegal combinations within Sherman anti-trust act, see note, 2 Am. & Eng. Ann. Cas. 956-960.

Anti-trust actions.—For an exhaustive review of federal and state anti-trust statutes, and of the scope of decisions thereon, see *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395-415, 23 L. R. A. (N. S.) 1260.

Anti-trust statutes designed to restrain the formation of unlawful trusts, combinations, and conspiracies in restraint of trade, under the laws of the state of Missouri, and found in Revised Statutes 1899, arts. 1, 2, ch. 143, (Ann. Stats. 1906, pp. 4150-4153 and 4157,) and the provisions thereof (§§ 8965, 8966, 8971, 8978), set out in full and construed in *State ex inf. Hadley, Attorney-General, v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902, 1006-1007, 1011, 1012, 1018.

State anti-trust statutes enumerated in *State v. Duluth Board of Trade*, 107 Minn. 506, 121 N. W. 395, 407, 23 L. R. A. (N. S.) 1260.

The mere fact of a conspiracy can not be made the subject of a civil action. Conspiracy merely gives the persons injured a remedy against parties not otherwise connected with the wrong. It is only significant as constituting matter of aggravation, and as such tending to strengthen the plaintiff's right of recovery. Repeated allegations of conspiracy between defendants have therefore but little significance, unless in addition there is stated a concrete cause of action: *Remmers v. Remmers*, 217 Mo. 641, 117 S. W. 1117, 1121.

CHAPTER CXIV.

Boycotts and Unlawful Strikes.

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§ 393. COMPLAINTS [OR PETITIONS].

FORM No. 936—Against labor union, to restrain interference with conduct
of business.

(In Crescent Feather Co. v. United Upholsterers' Union, 153 Cal.
433; 95 Pac. 871.)

[Title of court.]

The Crescent Feather Company, a
corporation, plaintiff,
v.
The United Upholsterers' Union,
local No. 28, C. Buhman, J. Con-
nell, C. Nelson, A. Nelson, B.
Rosenthal, H. C. Timms, and P.
Clawson, defendants.

Plaintiff complains of defendants, and for cause of action alleges:

1. That at all times herein mentioned the United Upholsterers' Union, local No. 28, was, and now is, an association of persons formed and composed of upholsterers employed in the manufacturing of mattresses and bedding at various places in the city and county of San Francisco, and is generally known as a labor union, and that at all of said times C. Buhman was, and he still is, the president, and J. Connell was, and he still is, the secretary, and that defendants C. Nelson, A. Timms, and P. Clawson were and are, respectively, members thereof.

2. That at all times herein mentioned, and since the 6th day of May, 1902, plaintiff has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the state of California, with its principal place of business at No. 405 Jackson Street, in the city and county of San Francisco, state of California; that the principal business carried on and done by said plaintiff at said place of business at all times herein mentioned has been, and now is, the manufacturing of mattresses, bedding, and upholstered goods, and the selling of the same to various patrons and customers with whom plaintiff has established business relations, and with the public in general, upon whose patronage and trade plaintiff depends for its existence.

3. That plaintiff at all times herein mentioned has employed, and is now employing, about seventy-five workmen, which said number of workmen is necessary for the proper conduct of its said business; that on or about the 5th day of October, 1904, a walking delegate, or representative of said union, called upon the manager of plaintiff, at its said place of business, and informed plaintiff through said manager that six men, all members of said union, who were then in the employ of plaintiff, must quit and abandon the employ of plaintiff, for the reason that said six men would not work in the same establishment with workmen who were not members of said union, and that all other employees of plaintiff, with the exception of said six men, were non-union workmen; that if plaintiff would not discharge all his non-union mattressmakers and employ none but mattressmakers who were members of said union, that said union would call out on a strike the said six men, members as aforesaid of said union, and that said union would declare a boycott against the plaintiff and against the business of plaintiff, and would not allow any of the members of said union to enter or remain in the employ of plaintiff; that thereupon plaintiff through its said manager notified the said representative, or walking delegate, of said union that it declined and refused to comply with the said demand, and would reserve the right to employ any one whom it pleased, provided said persons were willing to enter the employment of plaintiff and could do the work required.

4. That upon the refusal of plaintiff to comply with the demands made as aforesaid by said walking delegate or representative of said union, and in order to coerce plaintiff to the subjection of its

said business to the control of said union and the members thereof, the said union inaugurated and declared a boycott upon the said place of business of plaintiff, and did then and there carry out its threat, and did call out on a strike the said six men, members as aforesaid of said union, and said men thereupon quit and abandoned the employ of plaintiff, and since said time have not been in such employment with plaintiff, though all of said six men have visited the manager of plaintiff, and informed plaintiff, through said manager, that they were willing and anxious to again enter and remain in the employment of plaintiff, but were afraid to do so by reason of the fact that they feared violence at the hands of said union and certain members thereof if they entered the employment of plaintiff at any time when said boycott was being carried on.

5. That on or about the 5th day of October, 1904, the defendants entered into a combination, confederation, and conspiracy for the purpose of coercing plaintiff to subject the control of its business to the said United Upholsterers' Union, local No. 28, and certain members thereof, by inaugurating and declaring a boycott on the said business of plaintiff, and thereupon, and on the 5th day of October, 1904, in pursuance of said unlawful combination, confederation, and conspiracy, placed and continued to place representatives or pickets in the vicinity of the place of business of plaintiff, and that said representatives or pickets at all times intercept, interfere, molest, intimidate, and frighten the non-union employees of plaintiff, and endeavor by threats of doing violence to the persons of said employees to prevent them, the said non-union employees, from remaining in the employ of plaintiff; that said pickets have approached, and continue to approach, the said non-union employees of plaintiff, and have informed, and continue to inform, said non-union employees that if they remain in the employ of plaintiff they will meet with great bodily injury; that said pickets and representatives so stationed as aforesaid have informed several employees of plaintiff as follows: "You had better quit the employment of the Crescent Feather Company or we will fix you" (meaning thereby that unless said non-union employees of plaintiff quit said employment, said pickets and representatives would inflict, or cause to be inflicted, on said non-union employees great and serious physical violence).

6. That in furtherance of the said unlawful combination, confederation, and conspiracy of defendants, defendants, in addition to oral notice given to the employees of plaintiff hereinbefore mentioned, sent to the various patrons and customers of plaintiff the following notice, to wit:

[Union Sign.]

San Francisco Local No. 28,
of the
Upholsterers'
International Union of North America,
Affiliated with the American Federation of Labor.

Oct. 6, 1904. Gentlemen: We beg leave to inform you that the Crescent Feather Co., manufacturing mattresses and bedding, have had a boycott placed upon them by the upholsterers' union, on account of locking out all the mattressmakers employed in their factory, which is a direct violation of their agreement entered into with the upholsterers and mattressmakers of this city. All we ask of you is to withdraw your patronage from said firm, until such time as they shall re-establish the conditions they agreed to live up to prior to locking the men out. By so doing you will oblige the upholsterers and mattressmakers of your city, and assist us in maintaining reasonable conditions.

Hoping you will look upon this favorably, we remain,

Very truly yours, United Upholsterers' Union.

Local No. 28, San Francisco.

C. Buhman, Pres.

J. Connell, Sec.

7. That in furtherance of said combination, confederation, and conspiracy, the defendants have conspicuously posted in many public places in the city and county of San Francisco the following poster or card:

BOYCOTT.

Crescent Feather Co., manufacturer of mattresses, bedding and pillows. Don't buy mattresses made by the Crescent Feather Co.

[Signed] United Upholsterers' Union of San Francisco.

[Label]

8. That subsequent to the 5th day of October, 1904, and since the said boycott so ordered as aforesaid by said union, the said union and the members thereof have conspired, confederated, and combined among themselves and with other parties to the plaintiff unknown, and will continue to conspire, confederate, and combine among themselves and with other parties to the plaintiff unknown, to provide means and methods for impeding the plaintiff in the conduct and transaction of its aforesaid business, to interfere, by means of threats and intimidations, with employees not members of said union employed by said plaintiff, who are engaged in the line of work similar to that of the said members of said union, and to generally impede and obstruct the plaintiff in carrying on its aforesaid

business, and by threats and intimidations, by reason of placing pickets or representatives in the vicinity of the said place of business of plaintiff, compel and force the said employees engaged as aforesaid with plaintiff to quit and abandon the service of plaintiff.

9. That the defendants, in furtherance of their said unlawful combination, confederation, and conspiracy, continue to place representatives or pickets in the neighborhood and vicinity of the place of business of said plaintiff, and that said representatives or pickets are so stationed for the purpose not only of inducing, but intimidating, the non-union employees of plaintiff to quit its service, and are for the purpose of intimidating patrons and customers of plaintiff who may desire to attempt to do business with the plaintiff; that since the said representatives or pickets so placed as aforesaid in front of the said place of business of plaintiff, and since the said notices and posters hereinbefore set out have been distributed among the patrons and customers of plaintiff, plaintiff is unable to say how many patrons and customers of plaintiff have been intimidated by reason of the presence of said representatives or pickets, or by reason of having received said notices and having read said poster hereinbefore set out, and prevented thereby from patronizing the plaintiff, but, on its information and belief, plaintiff avers the fact to be that many persons and customers of said plaintiff have been, and now are, frightened and intimidated from entering the place of business of plaintiff by reason of the fact that representatives and pickets of said union are stationed as aforesaid in the neighborhood of the business of plaintiff, and by reason of the said notices and poster hereinbefore set out.

10. That the said pickets or representatives of said union are still engaged in the acts herein complained of, and threaten to continue the commission of the acts and each of the said acts to the irreparable damage and injury of this plaintiff, and that as a consequence of the acts herein set forth, plaintiff has already been damaged in the sum of \$1,000, and if the said acts continue, and the defendants threaten to continue the said acts as hereinbefore alleged, plaintiff will be irreparably damaged and his business will be greatly injured if not destroyed.

11. That plaintiff is without any plain, speedy, or adequate remedy at law, or without any remedy or relief other than an order and injunction of this court enjoining each and all of the said acts, and

enjoining the defendants from the commission of any and all of said acts.

12. That the defendants, and each and all of them, are financially irresponsible to respond to any judgment for damages against them for and on account of the commission of the acts or any of them hereinbefore alleged to have been committed and threatened to be committed by defendants.

Wherefore, plaintiff prays: That the defendants, their agents, attorneys, representatives, and servants, be perpetually restrained and enjoined from the performance of the said acts and each of the acts hereinbefore complained of, and from in any manner interfering with plaintiff in the conduct of its business, and restraining and enjoining the defendants, and each and all of them, from causing any person or persons, any agent or agents, any representative or representatives, any picket or pickets, to be stationed in the vicinity or neighborhood of the said place of business of plaintiff, or from otherwise at any time or times impeding, harassing, annoying, threatening, intimidating, or interfering with any person or persons transacting business with plaintiff, or from sending the customers and patrons of plaintiff the said notices hereinbefore set out, or from posting in any conspicuous place or otherwise the said poster or card hereinbefore set out, and for costs, and for such other and further relief as the court may deem just.

[Verification.]

Bush Finnell,
Attorney for plaintiff.

FORM No. 937—To enjoin a combination and conspiracy to boycott, where known and fictitious parties are sued.

(In *Goldberg-Bowen Co. v. Stablemen's Union*, 149 Cal. 429; 86 Pac. 806; 117 Am. St. Rep. 145; 8 L. R. A. (N. S.) 460; 9 Am. & Eng. Ann. Cas. 1219.)

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1. That at all the times mentioned the Stablemen's Union, local No. 8760, was, and now is, an association of persons formed and composed of stablemen employed in the various livery stables and private stables in the city and county of San Francisco, and generally known as a labor union, and that at all of said times T. F. Finn was the president and T. J. White the secretary, and that they and

defendants First Doe, Second Doe, [etc.], were and are, respectively, members thereof.

2-4. [Substantially as in paragraphs 2-4, preceding form.]

5. That on or about the 3d day of October, 1904, the said defendants entered into a combination, confederation, and conspiracy, for the purpose of coercing plaintiff to subject the control of its business to the said Stablemen's Union, local No. 8760, and the members thereof, by inaugurating and declaring a boycott of the said business of said plaintiff, and thereupon, and on the 3d day of October, 1904, in pursuance of said unlawful combination, confederation, and conspiracy, placed, and continued to place, representatives or pickets in front of the said places of business of plaintiff, carrying placards or transparencies which were false in fact, bearing the words and figures as follows, to wit: "Unfair firm; reduced wages of employees 50c per day. Please don't patronize."

6-10. [Substantially as in paragraphs 8 to 12, inclusive, preceding form.]

11. That defendants First Doe, Second Doe, [etc.], are each and all members of said Stablemen's Union, local No. 8760, and that their true names are unknown to plaintiff and therefore they are herein sued by fictitious names, and that plaintiff prays that the true names of said last-named defendants, when ascertained, may be inserted herein in lieu of said fictitious names.

[Concluding part.]

§ 394. DECREE.

FORM No. 938—In an action to enjoin a combination and conspiracy to boycott.

(In *Goldberg-Bowen Co. v. Stablemen's Union*, 149 Cal. 429; 86 Pac. 806; 117 Am. St. Rep. 145; 8 L. R. A. (N. S.) 460; 9 Am. & Eng. Ann. Cas. 1219.)¹

[Title of court and cause.]

This cause coming on regularly to be heard on the 22d day of December, 1904, upon the complaint of plaintiff, the Stablemen's Union, local No. 8760, of San Francisco, T. F. Finn, T. J. White, First Doe, Second Doe, [etc.], having refused to answer when the

¹ The decree appearing in form No. 938, in the case of *Goldberg-Bowen Co. v. Stablemen's Union*, supra, was written out by the court, modifying the judgment of the trial court, and the said decree was affirmed as so modified.

demurrer of defendants to plaintiff's complaint was overruled by this court, and Bush Finnell appearing for plaintiff, and there being no appearance for defendants on this hearing, and the findings of fact and conclusions of law having heretofore been signed and filed, and it appearing that plaintiff is entitled to a perpetual injunction as prayed for in its complaint against the defendants, the Stablemen's Union, local No. 8760, T. F. Finn and T. J. White, et al. Now, therefore:

It is ordered, adjudged, and decreed, that the Stablemen's Union, local No. 8760 of San Francisco, T. F. Finn and T. J. White, and all and each of the defendants herein, and each of their officers, members, agents, clerks, attorneys, and servants, be and they are hereby enjoined and restrained from interfering with or harassing or obstructing plaintiff in the conduct of its business at any of its places of business, to wit, No. 432 Pine Street and No. 965 Sutter Street, and No. 232 Sutter Street, in the city and county of San Francisco, state of California, by causing any agent or agents, representative or representatives, or picket or pickets, or any person or persons, to be stationed in front or in the immediate vicinity of said places of business, or any of them, or by a placard or transparency, having on it the words and figures as alleged in the complaint herein, or by a placard or transparency having words or figures of similar import, and from, at said places of business, or in front of them or any thereof, or in the immediate vicinity thereof, by means of pickets or transparencies, or otherwise, threatening or intimidating any person or persons transacting or desiring to transact business with said plaintiff, or being employed at said place or places of business by the plaintiff.

Done in open court, this 22d day of December, 1904.

J. C. B. Hebbard, Judge.

CHAPTER CXV.

Injuries to Personal Property, and the Unlawful Detention Thereof.

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§ 395. COMPLAINTS [OR PETITIONS].

FORM No. 939—For malicious injury to property.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

That on the day of , 19 , at , the defendant, wilfully and maliciously intending to injure the plaintiff, broke [or defaced, or mutilated, or otherwise injured or destroyed] goods, namely, [here describe], then and there the property of the plaintiff, and of the value, before so broken [or injured or destroyed], of \$; that after said goods were broken by defendant as afore-said, the same were of no value whatever [or, if partially destroyed, state the extent of the damage thereto]; that by reason of said acts of the defendant the plaintiff has been damaged in the said sum of \$.

Wherefore, plaintiff prays judgment against defendant for \$, and plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 940—For wrongful detention of personal property.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , plaintiff was the owner and in possession of the following-described goods and chattels, to wit: [Here describe the same], of the value of \$; that plaintiff has ever since been, and he now is, the owner of said goods and chattels and all thereof.

2. That on the day of , 19 , and while plaintiff was so the owner and in possession of said goods and chattels, the defendant, without the consent of plaintiff, took said goods and chattels from the possession of plaintiff, and ever since has wrongfully and unlawfully withheld and detained, and now wrongfully and unlawfully withholds and detains, the same from plaintiff.

3. That thereafter, on the day of , 19 , and while said goods and chattels were so in possession of the defendant, plaintiff demanded¹ of defendant the possession of the same; but defendant then refused, and he still refuses, to deliver the same to plaintiff, and has ever since unlawfully withheld the possession thereof from plaintiff, to his damage in the sum of \$.

[Concluding part.]

§ 396. ANSWERS.

FORM No. 941—Denial of damage.

[Title of court and cause.]

[After introductory part and appropriate denials:]

Defendant denies that plaintiff has sustained damage in the sum of \$, or in any sum whatsoever [etc.].

FORM No. 942—Denial of taking or detention.

[Title of court and cause.]

[After introductory part and appropriate denials:]

Defendant denies that on the date mentioned in said complaint [or petition], or at any other time, or at all, he took or carried away, or that he at said or any time or at all detained, or that he now detains or withholds, said property or any part thereof from the plaintiff.

[Concluding part.]

§ 397. ANNOTATIONS.

Pleading damages to trees and timber.—In an action to recover damages alleged to have been caused to trees and timber by noxious vapors and gases arising from a smelter owned by the defendant company, it is not necessary to use the word "noxious" in describing such vapors and gases in the complaint. It is sufficient as to this if such gases were alleged to have actually destroyed or damaged the property: *Johnson v. Northport S. & R. Co.*, 50 Wash. 567, 97 Pac. 746, 747.

Damages to matured fruit on trees and distinguishing damages to the trees themselves.—In an action brought under section 1111 of the Missouri Revised

¹ Averment of demand is not essential to a complaint in an action where the possession of defendant is wrongful from the beginning.

Statutes of 1899, (Ann. Stats. 1906, p. 963,) to recover damages for an injury to apple-trees and the fruit thereon, alleged to have been caused by a fire from one of defendant's locomotives; held, that the measure of damages, where it is disclosed that the fruit of the trees had matured, and therefore could not be considered as a part of the realty, but as personal property, was the difference between the market value of the damaged apples just before the fire and their market value just after. A different rule applies to the measure of damages caused by the injury to the trees themselves. Being attached to and sustained by the soil, they were part of the land—were real, and not personal, property. Recoverable damages for the injury to them consists alone of the depreciating effect such injury had on the market value of the land as the same might be determined by the jury: *Doty v. Quincy etc. R. Co.*, 136 Mo. App. 254, 116 S. W. 1126, 1128.

Allegation of demand—When form is immaterial.—Where the defendant denies the plaintiff's title, and alleges title in another, in an action to recover possession, and this appears affirmatively by defendant's answer, the form in which the demand is averred in the complaint is immaterial, for the reason that any kind of a demand would, under such circumstances, be unavailing: *Richey v. Haley*, 138 Cal. 441, 444, 71 Pac. 499.

Duress as defense in action for property unlawfully detained.—A party may recover money paid under duress, but it must appear, in an action for the possession of property unlawfully detained, that he was compelled to pay the money which was detained as a condition to the delivery of possession of the property so detained, that such detention was unlawful, that the payment was made under protest, and that such detention was attended by circumstances of hardship and inconvenience to the plaintiff: *O'Brien v. Quinn*, 35 Mont. 441, 90 Pac. 166, 167; *Fergusson v. Winslow*, 34 Minn. 384, 25 N. W. 942; *Briggs v. Boyd*, 56 N. Y. 289; *Weber v. Kirkendall*, 44 Neb. 766, 63 N. W. 35; *Lyman v. Lauderbaugh*, 75 Iowa 481, 39 N. W. 812; *Cobb v. Charter*, 32 Conn. 358, 87 Am. Dec. 178.

Third-party claim not required to be alleged.—In an action to recover possession or the value of property, it is not necessary for the plaintiff to make a verified third-party claim for the property, under section 906 of the Montana Code of Civil Procedure, or to allege that he had made such claim, as a condition precedent to maintaining his action; and, particularly, where there is a distinct denial in the answer of plaintiff's claim of ownership to the property in controversy: *O'Brien v. Quinn*, 35 Mont. 441, 90 Pac. 166, 167, citing *Richey v. Haley*, 138 Cal. 441, 71 Pac. 499, (holding that plaintiff is not required to set out a demand and right to possession under section 689 of the California Code of Civil Procedure,—corresponding to the above section of the Montana Code,—where the demand is alleged generally in the complaint, and the defendant had not denied the same).

CHAPTER CXVI.

Fraud and Deceit.

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§ 398. CODE PROVISIONS.

Deceit—Liability of deceiver.

California, § 1709. One who wilfully deceives another with intent to induce him to alter his position to his injury or risk, is liable for any damage which he thereby suffers. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5072. North Dakota, Rev. Codes 1905, § 5387. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 834; Comp. Laws 1909 (Snyder), § 1144. South Dakota, Rev. Codes 1903, C. C. § 1292.

Deceit defined.

California, § 1710. A deceit, within the meaning of the last section, is either:

1. The suggestion, as a fact, of that which is not true, by one who does not believe it to be true;
2. The assertion, as a fact, of that which is not true, by one who has no reasonable ground for believing it to be true;
3. The suppression of a fact, by one who is bound to disclose it, or who gives information of other facts which are likely to mislead for want of communication of that fact; or,
4. A promise, made without any intention of performing it. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 5073. North Dakota, Rev. Codes 1905, § 5388. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 835; Comp. Laws 1909 (Snyder), § 1145. South Dakota, Rev. Codes 1903, C. C. § 1293.

§ 399. COMPLAINTS [OR PETITIONS].

FORM No. 943—For cancelation of void contract on grounds of fraud and deceit.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , the plaintiff owned a farm situated in the town of , county of , state of , described as follows: [Here describe.]

2. That the plaintiff was then old, infirm, and blind, and thereby wholly incapacitated from attending to business, and the defendants on that day, fraudulently taking advantage of the plaintiff's said incapacity, procured him to sign a certain writing, without the payment to him of any consideration therefor, and which writing they falsely and fraudulently represented to plaintiff to be a petition for the purpose [here state; or state any other facts disclosing the fraud].

3. That on the day of , 19 , the plaintiff first discovered said fraud, and immediately [or state when] made application to the defendants for the possession of said writing, or for information as to its exact contents, but the defendants refused to surrender the same, or to give him any information concerning it.

4. That the plaintiff is informed and believes that the said writing is under seal, and is a deed of said farm, and conveys the same or some interest therein to the defendants, and that they intend to use the same for their own benefit, and to the prejudice of the plaintiff.

Wherefore, the plaintiff prays judgment that the said writing be decreed to be void; that the defendants produce the said writing, and deliver it up to be canceled, and for the costs of this action.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 944—For fraud in obtaining goods on credit.

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That on the day of , 19 , the defendant, with intent to deceive and defraud plaintiff, by inducing plaintiff to sell goods to him on credit, falsely represented to plaintiff that the defendant was solvent, and worth \$ over all his liabilities.

2. That on said date the plaintiff, relying on said representations, was induced thereby to, and did, sell on credit, and deliver to the defendant, the following-described goods and merchandise: [Here describe], of the value and price of \$, which price defendant promised to pay within days from the said sale and delivery thereof.

3. That said representations were false in this, [here state,] and were then known by the defendant to be false.

4. That although the said period in which said goods and merchandise were to be paid for has long since expired, the same have not been paid for, and no part of said purchase price thereof has been paid; that the defendant, having so obtained the possession of said goods, converted and disposed of them to his own use, to the damage of the plaintiff in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for \$,
and plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 945—For fraudulently procuring credit for another.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant, with intent to deceive and defraud the plaintiff, represented to him that one L. M. was solvent and in good credit, and worth the sum of \$ over and above his liabilities.

2. That the plaintiff, relying upon said representations, was induced to sell and deliver to the said L. M. [designate the goods], of the value of \$ [on months' credit].

3. That said representations were false in this, that the said L. M. was not then and there solvent or in good credit, or worth \$ over and above all his liabilities, but, on the contrary, and as the defendant then well knew, the said L. M. was then and there insolvent and not in good credit.

4. That said L. M. has neglected and refused to pay for said goods, although the term of credit aforesaid has expired, and by reason of the premises the plaintiff has wholly lost said goods, and the value thereof, to his damage in the sum of \$.

[Concluding part.]

FORM No. 946—Against a vendor, for deceit connected with the sale of land.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That the plaintiff, on the day of , 19 , made a contract, in writing, with defendant to buy of and from him a tract of land owned by the defendant, situate in , and described as follows: [Here follows description of the same], which said tract of land the defendant, with intent to deceive and defraud the plaintiff, and to induce, and which did induce, him to enter into said contract for the purchase of said tract of land, falsely represented to plaintiff was [here state representations made]; that the defendant was in a position of advantage in respect to knowledge of said facts in this, [here state specifically,] and that plaintiff could not by due

diligence learn the truth in respect thereto [or allege any deceitful or fraudulent measures taken by the defendant which caused the plaintiff to forego making an independent investigation]; that the plaintiff, confiding in the truth of said representations, and said represented and supposed facts being an essential inducement to said contract, entered into said contract with the defendant to purchase from him said tract of land, and to pay him the sum of \$ therefor, and did, on the day of , 19 , pay the defendant the said sum of \$ therefor.

2. That thereafter, to wit, on or about the day of , 19 , the plaintiff first learned that said representations were false, and immediately sought restitution, by demanding of the defendant the return of said purchase money, and thereupon tendered back to the defendant a deed to said property, reconveying, or seeking to reconvey, thereby the estate and title theretofore conveyed to the plaintiff as aforesaid, but that the defendant has failed and refused to make any amends or restitution in respect to said purchase and sale; that the plaintiff has sustained damage by said acts of the defendant in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for \$, and plaintiff's costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 947—To rescind contract for purchase of stock induced by fraud.

(In Davis v. Butler, 154 Cal. 623; 98 Pac. 1047.)

[Title of court and cause.]

Plaintiff complains of defendant, and alleges:

1. On the 7th day of November, 1905, the Salinas Valley Bottling Company was, and long prior thereto it had been, a corporation regularly organized under the laws of California, and engaged in the business of purchasing beer in bulk, bottling the same, and marketing and selling the bottled product, and on said date 430 shares of the capital stock of said corporation, of the par value of \$10 each, had been issued, and the defendant was the owner of 250 shares of said capital stock.

2. On said 7th day of November, 1905, the defendant was, and for a long time prior thereto has been, the general manager of the business affairs of said corporation, and had full and complete charge

of its business operations, and was entirely familiar with the extent of its indebtedness and with the business which it had been conducting and was then transacting, and with the extent of the profits which it had been and was then deriving from the carrying on of said business.

3-7. [Here follow averments as to contract for the purchase of stock entered into; the fraudulent representations of defendant which induced the plaintiff to make said contract; the means taken by defendant to prevent an independent investigation concerning the value of the stock; the payments made in cash and stock in another company therefor, etc.]

8. That about January 5, 1906, the plaintiff discovered that said statements and representations made by the defendant as aforesaid were false and untrue, and he thereupon elected to rescind said agreement of purchase hereinabove referred to, and on the 11th day of January, 1906, he notified the defendant, in writing, that he had rescinded said agreement, and tendered to the defendant and offered to transfer to him said 250 shares of stock hereinabove referred to, and demanded of the defendant that he restore to plaintiff the property and money received by the defendant from the plaintiff as aforesaid, but the defendant refused, and still refuses, to comply with said demand.

9. That the plaintiff has received nothing whatever from the defendant on account of said purchase and sale except said 250 shares of stock hereinabove referred to, and he has received no profits thereon, and said 250 shares of stock, at the time said transfer was made, were, and are now, of greater value than when they were transferred by defendant to plaintiff, and a transfer by plaintiff to defendant of said 250 shares of stock will restore to defendant everything plaintiff has received by reason of the purchase thereof on November 7, 1905, aforesaid, and plaintiff is now ready, able, and willing to restore said 250 shares of stock to the defendant, and now offers to do so.

Wherefore, plaintiff prays the decree of the court that the agreement of purchase and sale referred to in the complaint be rescinded, and that defendant be required to transfer to the plaintiff the said property received by defendant from plaintiff upon plaintiff trans-

ferring to defendant said 250 shares of stock, and for general relief and for costs of suit.

[Verification.]

Daugherty & Lacey,
Attorneys for plaintiff.

FORM No. 948—For fraudulently inducing subscription to stock where device of a secret agreement is employed.

[Title of court and cause.]

The plaintiff complains of the defendants, and alleges:

1. That on the day of , 19 , the defendants falsely and fraudulently represented to the plaintiff that they had organized a company under the name of the Company, of which the defendants were officers, and that said company owned a certain valuable right [here describe]; and that various individuals, to wit, [naming them,] well known as men of character and pecuniary responsibility, had taken shares of stock in said company.

2. That the plaintiff, relying on said representations, subscribed for shares of the capital stock in said company, and paid the defendants therefor \$, in a negotiable note, which was transferred by the defendants before maturity to a bona fide holder, and the plaintiff was compelled to and did pay said note.

3. That the defendants, for the purpose of cheating and defrauding the plaintiff and others, had devised and carried out the scheme of organizing said company, and had procured the aforesaid individuals and others to become apparent stockholders, under the secret agreement that they were not to be called upon for payment for their stock, but that any notes given by them in payment were to be given up after being used to induce others to subscribe, and they were so given up.

4. That plaintiff has tendered back to the defendants all certificates of stock received by him [or money or other property, specifying], and demanded a return of said note or the value thereof, but that defendants refused, and still refuse, to either accept said certificates or to return said note, or to repay plaintiff the value thereof. [Or allege the fact, if no certificates of said stock were ever delivered to or received by the plaintiff.]

5. That said stock is utterly worthless, and said pretended valuable right [to make and sell the said articles] is also worthless; all whereof is to the plaintiff's damage in the sum of \$.

[Concluding part.]

FORM No. 949—For fraudulently representing goods sold to be the property of the seller.

[Title of court and cause.]

[After introductory part, allegation as to the sale of goods and false and fraudulent representations made by defendant as to his title and right to sell the same; reliance of the plaintiff upon such representations and purchase of the goods by him; the amount paid therefor; and the knowledge of defendant as to the falsity of such representations:]

That on the day of , 19 , one X. Y. brought an action [in this court] against plaintiff to recover said goods or the value thereof, and after due proceedings had therein, and after due notice thereof given to the defendant herein, to wit, on the day of , 19 , a judgment in said action was duly given and made in favor of the said X. Y. and against this plaintiff; that pursuant to said judgment plaintiff herein thereupon restored said property to the said X. Y. [Or allege payment by plaintiff of the judgment, etc.]

That by reason of the premises the plaintiff has been damaged in the sum of \$.

[Concluding part.]

FORM No. 950—To rescind contract of exchange for fraud.

(In *Shopbell v. Boyd*, 9 Cal. App. 136; 98 Pac. 69.)

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1. That on the 12th day of December, 1905, and for a long time prior thereto, plaintiff was the owner of all that certain real property situate in the city of Chicago, county of Cook, state of Illinois, and more particularly described as follows, to wit: [Here follows description of said real property.]

2. That on the 12th day of December, 1905, plaintiff entered into an agreement with defendant Mattie H. Boyd, whereby she agreed to exchange the said property hereinbefore mentioned for certain real property situate in the city of Los Angeles, county of Los Angeles, state of California, and described in said agreement as No. 1414 Tennessee Street, Los Angeles, California, and more particularly as follows, to wit: [Here follows description of property in California], subject to a deed of trust to secure the payment of \$1,800, a

copy of which said agreement, marked "Exhibit A,"¹ is attached hereto [etc.].

3. That plaintiff was induced to make said agreement upon the false representations of the defendant Mattie H. Boyd, and defendant J. Newton Bunch, agent of said Mattie H. Boyd, who represented that the said property owned by the said Mattie H. Boyd was of the value of \$4,000, and was leased for one year to a good and responsible tenant at the monthly rental of \$25 per month, and that the title to said property was free and clear of all encumbrances, except said deed of trust above mentioned; that plaintiff, believing and trusting in the representations so made by said defendants, and believing that the rental of said premises would pay the instalments on said deed of trust, and that the title of said property was in said Mattie H. Boyd, free and clear of all encumbrances except said deed of trust, was induced to enter into said agreement.

4, 5. [Here follow averments as to execution and exchange of deeds at the instance and upon the fraudulent solicitation of the defendants pending the search of title, the discovery of the falsity of the representations made by defendants, etc.]

6. * * * That as soon as plaintiff discovered that said representations of defendants were false, and that the title to said property last described was not clear of encumbrance, except as to said deed of trust, she, on the 3d day of February, 1906, tendered to the defendants herein a good and sufficient deed reconveying to said Mattie H. Boyd the said property last described, and also tendered the sum of \$15, the rental value of said premises from the 1st day of January, 1906, to the 1st day of February, 1906, and that the same constituted everything of value received by her in the matter of said exchange; that plaintiff thereupon, and at the same time, gave defendants notice of the rescission of said agreement, a copy of which said notice is attached hereto and made a part hereof, and marked "Exhibit B,"² and notified the defendants that plaintiff was, and at all times had been, ready, willing, and able to do that which in equity and good conscience she should do with reference to the

¹ Exhibit A to the foregoing complaint is an ordinary agreement for exchange of property, the character of which is sufficiently indicated by the complaint.

² Exhibit B is, in brief, a notice of tender of deed and rentals received by the plaintiff and demand for return deed, and statement that rescission is made upon the ground of false representations (as shown in the complaint), mentioning defects in title to the Tennessee-Street property, closing with demand for reconveyance of the Chicago property: *Shopbell v. Boyd*, 9 Cal. App. 136, 98 Pac. 69.

said premises; that at the time plaintiff tendered to defendants everything of value that she had received as aforesaid she demanded of defendants that the deed to the said Chicago property, left with defendant J. N. B., be returned to her; that defendants then and there refused to accept the said tender, and refused to return the said deed, and plaintiff is informed and believes, and therefore alleges, that the said defendants have caused the said deed to said Chicago property to be recorded in the county recorder's office of the county of Cook, state of Illinois, and unless restrained by an order of this court that they will dispose of said property, and that plaintiff will be irreparably injured thereby.

Wherefore, plaintiff prays judgment and decree of this court:

(a) That said agreement between the plaintiff and defendants be canceled and set aside.

(b) That defendants, and each of them, be restrained by order of this court from conveying the said Chicago property or parting with the title thereto pending this action.

(c) That defendants, or either of them in whom the title now exists, be required by order of this court to execute and deliver to plaintiff herein a good and sufficient deed reconveying to the plaintiff the said Chicago property, and for such other and further relief as may be equitable, and for costs of this action.

Davis, Kemp, & Post,

[Verification.]

Attorneys for plaintiff.

FORM No. 951—To recover property obtained by fraud and collusion, and to adjudge plaintiffs the owners thereof.

(In *Boon v. Root*, 137 Wis. 451; 119 N. W. 121.)¹

[Title of court and cause.]

Plaintiffs complain of defendants, and for cause of action aliege:

That Lavina C. Curtis, a resident of the village of Rio, Wisconsin, was prior to her death, hereinafter alleged, an aunt of the plaintiffs; that on January 4, 1890, in expectation of death, said Lavina C. Curtis made, executed, and delivered a conveyance of lands [here described] to her husband, Delos Curtis, for the term of his natural life; that after the death of the said Delos Curtis said real property

¹ The complaint in the form No. 951 sets forth the substantial averments in the case as the same appear in the report thereof: *Boon v. Root*, 137 Wis. 451, 119 N. W. 121, 122.

was to go to the plaintiffs, who were then living with their said aunt, the mother of plaintiffs having died in the year 1881; that said Lavina C. Curtis died January 16, 1890; that the conveyance aforesaid was on February 3, 1890, recorded in the office of the county recorder of Columbia County, state of Wisconsin, the same being the county in which said lands are situated, and the same remains of record therein.

2. That the plaintiffs, except Rose V. Hoban, within a few weeks after the death of their said aunt, moved to the home of their father in Chicago, where they and each and all of them have since resided; that said Rose V. Hoban went to her father's home in June or July, 1890; that, with this exception, the plaintiffs have resided in Chicago since their said removal thither; that in July, 1890, said Delos Curtis married one Loretta D. Root, a widow with two children by a former marriage; that said Delos Curtis failed and neglected to pay the taxes assessed against said premises, in which he held such life estate, and, as a consequence of said neglect, the said premises were sold at tax sale on the day of , 1892, for the sum of \$12.21, to William H. Root, son of said Loretta D. Curtis, formerly the said Loretta D. Root.

3. That on August 28, 1895, a tax-deed was issued to said Loretta D. Curtis as the owner of the tax certificate issued to her said son; that notice of said intention to take a tax-deed was served on her husband, but that no notice thereof was given to the plaintiffs or any of them; that on July 22, 1901, said Loretta D. Curtis executed a life lease of said premises to said Delos Curtis and Carrie M. Bush, her daughter; that this lease was recorded August 30, 1901, in the office of the county recorder of said county, state aforesaid; that on May 29, 1903, said Loretta D. Curtis executed a warranty deed of the said premises, subject to said lease, to the said William H. Root, and that said deed was recorded in the office of the county recorder of said Columbia County on September 9, 1903.

4. Plaintiffs allege that Delos Curtis intentionally omitted and refused to pay the taxes assessed against the premises, and that the tax-deed aforesaid was procured by the connivance and collusion of said Delos Curtis, Loretta D. Curtis, William H. Root, and Carrie M. Bush, and that said tax proceedings were taken for the purpose of fraudulently cutting off and destroying the rights of the plaintiffs in the premises.

5. That said Loretta D. Curtis died in the year 1905, and the said Delos Curtis died on the 23d day of March, 1907.

6. Plaintiffs allege that none of the facts regarding the procuring of the said tax-deed, and the said collusion and connivance of the defendants with the defendants' mother and Delos Curtis in fraudulently securing said tax title as aforesaid, were known to plaintiffs, or any of them, until after the death of said Delos Curtis; that plaintiffs had always believed that he, said Delos Curtis, as life tenant under the deed from said Lavina C. Curtis, paid the taxes on the premises; that the plaintiffs, and each and all of them, never had any knowledge or notice whatever that the said taxes were not paid.

7. That said Carrie M. Bush is now in possession of the premises; and that the said Carrie M. Bush, with her said brother, William H. Root, are the sole heirs at law of the said Loretta D. Curtis.

8. Plaintiffs allege that they are the owners of the said premises, and that the defendants claim an interest therein adverse to the plaintiffs, by and through the said tax-sale and tax-deed, but that the said claim of the defendants is inferior and subordinate to the rights of the plaintiffs as shown herein.

That plaintiffs have tendered and offered to pay the said William H. Root the said sum of \$12.21, with interest from the date of the tax-sale to the time of said tender and offer, and now and herewith tender and offer to pay said sum to the said William H. Root, with interest from the date of said tax-sale.

Wherefore, plaintiffs pray that the said tax proceedings, the said life lease from said Loretta D. Curtis to said Delos Curtis and said Carrie M. Bush, and said conveyance to said William H. Root, be set aside and held for naught, and that the defendants be required to release all their pretended interests in the said premises, that plaintiffs be adjudged the owners thereof, and that defendants deliver the possession thereof to the plaintiffs, and for such other and further relief as the court may deem just.

H. E. Andrews,
Attorney for plaintiffs.

[Verification.]

§ 400. ANSWERS.

FORM No. 952—Denial of fraud.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition], and denies:

That he obtained the said deed [or other instrument] from the plaintiff by fraud or misrepresentation. [Deny the particular allegations.]

FORM No. 953—Defense that the writing declared upon in the complaint departed from the oral agreement in substantial and material respects, and was entered into through the false and fraudulent representations of the plaintiff's agent.—
Action to recover for goods sold and delivered.

(In *Providence Jewelry Co. v. Crowe*, 108 Minn. 84; 121 N. W. 415.)

[Title of court and cause.]

[After formal introductory part, denials of the averments of the complaint inconsistent with this defense, and after stating the terms of the oral agreement:]

That on the said 20th day of March, 1907, and immediately after said oral contract and agreement was entered into by and between the plaintiff, through its agent, and the defendant, the plaintiff, by its agent, voluntarily assumed to reduce the said oral contract to writing; that plaintiff, through its said agent, with intent to cheat and defraud defendant, and for the purpose of inducing defendant to sign said written instrument, pretended to reduce said oral contract to writing; that defendant, relying upon the honesty and integrity of said agent, and believing that said agent had reduced the said oral contract to writing in the exact terms of said oral agreement, and not otherwise, was induced to sign the same; * * * that the said agent, for the purpose of cheating and defrauding this defendant, made the aforesaid writing, which is a different contract and agreement from the one orally made by the plaintiff, through its said agent, and defendant, and which said written instrument does not contain any of the terms and conditions of said oral agreement; that, depending upon the false and fraudulent statements of the said agent then and there made, defendant did not read the said written instrument so reduced to writing, and, believing and relying upon said written instrument containing the provisions and agreements of the oral contract aforesaid, and not otherwise, defendant signed the same without any consideration, and without any knowledge on his part of the contents or the purport thereof; that under the belief on the part of the defendant that the said instrument so signed was the said oral contract hereinbefore mentioned, which

belief was induced by said false and fraudulent representations of the plaintiff, through its agent, the defendant has never consented to enter into the contract or agreement set forth in said complaint.

[Concluding part.]

§ 401. ORDER AND DECREE.

FORM No. 954—Order to show cause and preliminary injunction.—Action to rescind contract for fraud.

(In *Shopbell v. Boyd*, 9 Cal. App. 136; 98 Pac. 69.)

[Title of court and cause.]

The plaintiff in the above-entitled cause having commenced an action in the superior court of the county of Los Angeles, state of California, against the above-named defendants, and having applied for an order of this court against defendants, requiring them to refrain from certain acts in said complaint and more particularly hereinafter mentioned; now, on reading the said complaint in said action, duly verified by the oath of the plaintiff, and it satisfactorily appearing to me that this is a proper case for an injunction and that sufficient grounds exist therefor:

It is hereby ordered, that you, Mattie H. Boyd and J. Newton Bunch, defendants in said action, appear on Friday, the 23d day of February, 1906, at the hour of ten o'clock A. M. of said day, in department 3 of the superior court of the county of Los Angeles, state of California, at the courthouse in said county, and then and there show cause, if any you have, why an injunction should not be issued restraining you from disposing of, directly or indirectly, or transferring by deed or otherwise, that certain real property situate in the city of Chicago, county of Cook, state of Illinois, and described in the complaint herein, during the pendency of this action.

And the plaintiff herein, having given an undertaking approved and as required by me in the sum of \$500, you and each of you are strictly commanded to refrain from disposing of or encumbering, directly or indirectly, by deed or otherwise, the property hereinbefore referred to, until the further order of this court.

Dated this 9th day of February, 1906.

D. K. Trask,
Judge.

FORM No. 955—Judgment in action to rescind contract for purchase of stock induced by fraud.

(In *Davis v. Butler*, 154 Cal. 623; 98 Pac. 1047.)

[Title of court and cause.]

It is ordered, adjudged, and decreed herein, as follows:

That the agreement set forth in the complaint whereby plaintiff purchased from defendant 250 shares of the capital stock of the Salinas Valley Bottling Company, a corporation, be and the same is hereby rescinded, canceled, and set aside.

That the plaintiff recover of the defendant ten shares of the capital stock, unencumbered, of the San Miguel Flouring Mill Company, a corporation, and the sum of \$360 in money, and the possession of lots 1, 2, and 3, of block 8, as per Spring's map of Salinas City, Monterey County, state of California, and that defendant recover of the plaintiff 250 shares of the capital stock of the Salinas Valley Bottling Company, a corporation, unencumbered; that the defendant transfer to plaintiff ten shares of the capital stock of the said San Miguel Flouring Mill Company, unencumbered, and the certificate therefor now in possession of the defendant, with the sum of \$360 in money, and that he execute, acknowledge, and deliver to plaintiff a good and sufficient conveyance of the real property hereinabove described, free and clear of encumbrance; that until said transfers are completed, and until the final disposition of this case, J. J. Kelly be and he is hereby appointed receiver to take and hold possession of all of said property, upon giving an undertaking in the sum of \$500, as provided by law (Cal. Code Civ. Proc., § 567). It is further decreed, that said J. J. Kelly be and he is hereby appointed commissioner of this court, and, as such, he is empowered and directed to execute the transfers and conveyance herein referred to upon the failure of either party to comply with this decree, when the judgment in this cause shall have become final; that plaintiff recover his costs of suit, taxed at \$.

B. V. Sargent,
Judge of Superior Court.

For substance of a complaint in an action for equitable relief against fraudulent acts of the promoters of a corporation, see *Wills v. Nehalem Coal Co.*, 52 Ore. 70, 96 Pac. 528, 530.

Form of complaint in an action for obtaining money and property by false and fraudulent representations: *Warner v. Bates*, 75 Wis. 278, 43 N. W. 957, 958.

Form of complaint in an action for alleged fraud and deceit in the sale of mining stock: *Barndt v. Frederick*, 78 Wis. 1, 3, 47 N. W. 6, 11 L. R. A. 199.

Form of petition in an action for fraud and deceit in a transaction relating to a timber-culture claim: *Davis v. Jenkins*, 46 Kan. 19, 26 Pac. 459.

Form of answer in an action to recover damages for fraudulent representations: *Warren v. Hall*, 20 Colo. 508, 509, 38 Pac. 767.

§ 402. ANNOTATIONS.—Fraud and deceit.

1. Essential allegations.
- 2, 3. Action for deceit.—When maintainable.—Cause of action stated.
4. Defendants' knowledge of falsity must be averred.
5. Preventing recovery on fraudulent instrument.
6. Specific pleading of fraud.
7. General charge of fraud insufficient.
8. Bill in equity.—Fraud in general terms.
9. Jurisdiction acquired by court of law.
10. Conclusions not pleadable.
11. Words "fraud," "unlawful," "wilful," etc.
12. Waiver as to averring specific facts.
13. Constructive fraud.—Manner of pleading.
- 14, 15. Election between remedies in cases of fraud.
16. Defense that contract does not conform to oral agreement.
17. Fraud as defense must be set up.
18. Defense as to value.—When not permitted.

1. **Essential allegations.**—A complaint in an action to recover damages alleged to have been caused by fraudulent representations inducing the plaintiff to purchase stock in a certain mining company is sufficient where the essential allegations are made: (1) that the representations which induced the plaintiff to purchase from the defendant were made to the plaintiff by the defendant; (2) that such representations were false, and that the defendant knew them to be false; and (3) that the plaintiff was deceived thereby to his damage in a sum specified: *Ford v. Freeman*, 138 Wis. 503, 120 N. W. 234, 235.

2. **An action for damages for deceit is maintainable** where the party is induced to purchase an interest in a property by false statements as to the amount of business done and profits realized by the sellers while they were conducting the business: *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 Pac. 32, 34; *Markel v. Moudy*, 11 Neb. 213, 7 N. W. 853.

3. **A cause of action for deceit is stated in a complaint which sets forth, in substance, the following facts:** "That during 1886 the Swedish-American Publishing Company, a corporation, issued to plaintiff two shares of its capital stock, for which he paid \$10 each, being the par value thereof; that such corporation was

engaged in publishing a newspaper called the 'Svenska Amerikanska Posten'; that from the time of the purchase of the stock until 1901 defendant was the managing director of the company; that some time during 1901, the exact date being unknown to plaintiff, defendant fraudulently represented to plaintiff that the stock which he, plaintiff, had purchased was worthless, and that the company was in debt; that plaintiff was ignorant of the true condition of affairs, had no knowledge that the corporation had at that time disposed of the newspaper, and, having no knowledge of the true facts, relied upon the representations of defendant that the same was of no value, and transferred said stock to defendant at the price for which he bought the same; that each of such shares of stock was worth at that time at least the sum of \$7,500; that by reason of the fact that plaintiff had parted with his stock he was damaged in the sum of \$12,500; that on or about June 15, 1908, and immediately after discovering the facts constituting said fraud, plaintiff offered to restore the consideration to defendant, rescinded the sale, and duly demanded that defendant return the stock certificate, which he refused to do; that defendant has converted the shares of stock to his own use, and that it will

be useless to make any further demand for their return," etc.: *Newstrom v. Turnblad*, 108 Minn. 58, 121 N. W. 236.

4. Defendant's knowledge of the falsity must be averred.—A complaint in an action to recover damages alleged to have been sustained by plaintiff by reason of misrepresentations made by defendant is insufficient where it does not allege defendant's knowledge of the falsity of the representations made to the plaintiff, and where it is not alleged that the representations were made for the purpose of inducing the plaintiff to purchase the property: *Colorado Springs Co. v. Wight*, 44 Colo. 179, 96 Pac. 820, 822.

5. Preventing recovery on fraudulent instrument.—The law relieves against fraud negatively by preventing either a recovery or a defense founded upon an instrument induced by fraud: *Olston v. Oregon W. P. & R. Co.*, 52 Ore. 343, 96 Pac. 1095, 1097, 97 Pac. 538, 20 L. R. A. (N. S.) 915, citing *Lamborn v. Watson*, 6 Har. & J. (Md.) 252, 255, 14 Am. Dec. 275.

6. Specific pleading of fraud.—The law is well settled that where a party seeks to recover on the grounds of deceit and false and fraudulent representations he must plead the particular representations that were made, and that they were false and fraudulent and material, and that the party injured believed and relied on such statements, and acted upon the belief and with the understanding that such false and fraudulent representations were in fact true. He must also show the specific instances in which they were untrue, and in what the untruth or deception consisted: *Kemmerer v. Pollard*, 15 Idaho 34, 96 Pac. 206, 207; *Brown v. Bledsoe*, 1 Idaho 747; *Watson v. Molden*, 10 Idaho 571, 79 Pac. 503; *Specht v. Allen*, 12 Ore. 117, 6 Pac. 494; *Kountze v. Kennedy*, 147 N. Y. 124, 41 N. E. 414, 29 L. R. A. 360, 49 Am. St. Rep. 651; *Rothmiller v. Stein*, 143 N. Y. 581, 38 N. E. 718, 26 L. R. A. 148; *Southern Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, 31 L. ed. 678.

7. General charge of fraud insufficient.—A complaint charging fraud generally, but which sets forth no facts supporting the allegation of fraud, is insufficient: *Gill v. Manhattan L. Ins. Co. (Ariz.)*, 95 Pac. 89.

8. A bill in equity charging fraud in general terms is sufficient where some of the facts are pleaded, and where there is no motion for a more specific statement: *Johnson v. Carter (Iowa)*, 120 N. W. 320, 322; *Harrison v. Kramer*, 3 Iowa 543; *Gunsel v. McDonnell*, 67 Iowa 521, 25 N. W. 759.

9. Jurisdiction acquired by court of law.—Where a court of law has already obtained jurisdiction of a controversy involving an alleged fraud, equity will not interfere: *Biermann v. Guaranty M. L. L. Co.*, 142 Iowa 341, 120 N. W. 962, 964, citing *Nash v. McCathern*, 183 Mass. 345, 67 N. E. 323; *Eaton v. Trowbridge*, 33 Mich. 454; *Sweeny v. Williams*, 36 N. J. Eq. 627; *Smith v. Short*, 11 Iowa 523; *Smith v. Griswold*, 95 Iowa 684, 64 N. W. 624.

10. Conclusions not pleadable.—Facts constituting fraud, not conclusions, must be alleged; otherwise, the action or defense upon such ground is ineffectual: *DuBois v. First National Bank*, 43 Colo. 400, 96 Pac. 169, 170.

11. Words "fraud," "unlawful," "willful," etc.—The use of the word "fraud" does not enlarge the meaning of the facts pleaded: *Evert v. Tower*, 51 Wash. 514, 99 Pac. 580, 21 L. R. A. (N. S.) 950. Nor does the use of the adjective "unlawful" add to the strength of an allegation: *Phillips v. Smith (Ariz.)*, 95 Pac. 91. Nor does the use of the adverbs "purposely" and "willfully" add anything to a charge of concealment or fraud: *Gill v. Manhattan L. Ins. Co. (Ariz.)*, 95 Pac. 89.

12. Waiver as to averring specific facts.—A failure to allege particular facts constituting fraud, or estoppel, or other special defenses, may be waived by a failure to demur or to object to the evidence offered at the trial: *Sukeforth v. Lord*, 87 Cal. 399, 403, 25 Pac. 497. See *Lee v. Flagg*, 37 Cal. 328, 335, 99 Am. Dec. 271; *Hutchings v. Castle*, 48 Cal. 152, 155; *Bull v. Ford*, 66 Cal. 176, 4 Pac. 1175; *Hughes v. Wheeler*, 76 Cal. 230, 18 Pac. 386. Contra: *Albertoli v. Branham*, 80 Cal. 631, 633, 22 Pac. 404, 13 Am. St. Rep. 200.

13. Constructive fraud.—Manner of pleading.—Under the principle that a party must recover upon the cause of action pleaded, and upon no other, a dis-

inction as between pleading fraud and the facts constituting constructive fraud is made, as follows: "When the former is relied on, the acts done must be set out, and, the intent being material, it must be averred that they were done fraudulently, or with intent to cheat and defraud,—as, for example, in an action for fraud and deceit. The acts set out may be fair on their face. The intent with which done may be fraudulent. But when the right of recovery or relief is founded on constructive fraud, all that is necessary, and what must be done, is to plead the acts. With those acts pleaded, the court will determine whether the doing of them worked a constructive fraud. In this last class of cases it is not necessary to use the words "fraud" or "fraudulently," which, when used, are merely epithets, and therefore meaningless: *Barrie v. United Railroads*, 138 Mo. App. 557, 119 S. W. 1020, 1050; *Martin v. Lutkewitte*, 50 Mo. 58; *McGindley v. Newton*, 75 Mo. 115; *Smith v. Sims*, 77 Mo. 269; *Clough v. Holden*, 115 Mo. 336, 353, 21 S. W. 1071, 37 Am. St. Rep. 393; *Nichols v. Stevens*, 123 Mo. 96, 25 S. W. 578, 27 S. W. 613, 45 Am. St. Rep. 514; *Nagel v. Railway*, 167 Mo. 89, 66 S. W. 1090; *Mallinckrodt Chemical Works v. Nemnich*, 169 Mo. 388, 69 S. W. 355; *Newman v. Trust Co.*, 189 Mo. 423, 444, 88 S. W. 6.

14. Election between remedies in cases of fraud.—Where a party is induced to purchase an interest in a business upon false and fraudulent representations as to the profits of such business, upon discovery of the fraud, he has his election to rescind the sale and return the property, or to return the property and prosecute his claim for damages for false and fraudulent representations: *Del Vecchio v. Savelli*, 10 Cal. App. 79, 101 Pac. 32, 34.

15. An election of remedies once made is conclusive and irrevocable: *Gaffney v. Megrath*, 23 Wash. 476, 494, 63 Pac. 520; *Babcock-Cornish Co. v. Urquhart*, 53 Wash. 168, 101 Pac. 713, 715; *Conrow v. Little*, 115 N. Y. 387, 22 N. E. 346, 5 L. R. A. 693; *Robb v. Vos*, 155 U. S. 13, 15 Sup. Ct. 4, 39 L. ed. 52.

16. Defense that contract does not conform to oral agreement.—The substan-

tial averments of a defense that the contract sued upon does not conform to the oral agreement, and that the execution of the contract was induced by false and fraudulent representations, are given as follows:

1. The making of the oral contract, and the terms thereof.

2. That the plaintiff assumed and undertook to reduce the oral contract to writing.

3. That the plaintiff pretended or held out as true that he had done so.

4. That the defendant believed the representations of the plaintiff to the effect that the oral contract had been reduced to writing, and, in reliance on the statements and representations of the plaintiff, signed the writing.

5. That the writing did not in fact state the terms of the oral agreement, that it was entirely different, or that it was a substantially different agreement from the one intended.

6. That the defendant relied upon the false and fraudulent statements of the plaintiff, not knowing the same to be false, and therefore and not otherwise, signed the written agreement: *Providence Jewelry Co. v. Crow*, 108 Minn. 84, 121 N. W. 415, 416.

17. Fraud as a defense must be set up.—Fraud must be alleged whenever it constitutes an element of the cause of action or defense which is of an affirmative nature invoked as conferring the right against the plaintiff: *Gray v. Galpin*, 98 Cal. 633, 635, 33 Pac. 725.

18. Defense as to value.—When not permitted.—It is a fundamental principle of the law of fraud that where one has, by false and fraudulent representations as to the quality of property, led another to believe it to be possessed of valuable qualities, and thereby wrongfully induced the other to buy the property, presumably in order to obtain the benefit of property possessing those qualities, the seller will not be allowed to show as a defense to an action for such fraud that the property, in its actual condition, was worth the price paid or more: *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011, 1015, (to recover money alleged to have been paid as the price of corporate stock).

CHAPTER CXVII.

Fraudulent Transfers and Assignments.—Creditors' Suits.

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§ 403. COMPLAINTS [OR PETITIONS].

FORM No. 956—Creditors' suit, by one suing on behalf of himself and others.

[Title of court and cause.]

The plaintiff complains on behalf of himself and of all others, the creditors of L. M., who shall in due time come in and seek relief by and contribute to the expenses of this action, and alleges:

1. That the said creditors of L. M. are very numerous, to wit, more than in number; that some of them are unknown to the plaintiff, and can not with diligence be ascertained by him; that it

is impracticable to bring them all before the court in this action; wherefore, plaintiff sues for the benefit of all.

2. [Set forth cause of action affecting all parties for whose benefit the action is brought.]

[Concluding part.]

FORM No. 957—Against debtor, to reach demands due him from third parties, and for appointment of receiver.

[Title of court and cause.]

[Introductory part.]

1. That on the day of , 19 , at , in the court in and for the county of , in this state, the plaintiff recovered a judgment, which was duly given, made, and rendered by said court against the defendant for \$.

2. That on said day said judgment was docketed in the office of the clerk of said county, and on the day of , 19 , a transcript thereof was filed, and the said judgment was docketed in the clerk's office of the county of , in this state.

3. That on the day of , 19 , an execution in due form was issued upon the said judgment against the personal and real property of the defendant, to the sheriff of said county of , in which county the defendant then resided.

4. That the said execution has been duly returned by said sheriff wholly unsatisfied.

5. That prior to the commencement of the action in which the said judgment was obtained, and after the indebtedness upon which said judgment was obtained had accrued, the defendant was, and for several years previous thereto had been, engaged in mercantile business at , and, as the plaintiff is informed and believes, various persons became indebted to him in a large amount; that the defendant had, at the time of the commencement of this action, moneys due to him to a large amount, to wit, to an amount not less, as the plaintiff is informed and believes, than \$, a considerable portion of which is evidenced by charges on his books of account, which the said defendant refuses to produce or allow to be examined by or on behalf of the plaintiff; that the plaintiff therefore does not know, and is unable to specify, the particular items or amount of said indebtedness, or the names of the several persons from whom the same are due; but is informed and believes that several of such

persons, owing defendant in the aggregate a sum not less than \$ _____, reside at _____, and are solvent and able to pay the respective demands against them.

Wherefore, the plaintiff prays:

(a) That the defendant be adjudged to apply to the payment of said judgment and interest thereon, together with the costs of this action, said property, debts, choses in action, and equitable interests belonging to him, or held in trust for him, or in which he is in any way or manner beneficially interested.

(b) That he be enjoined from selling, transferring, or interfering with said property, debts, things in action, and equitable interests.

(c) That he be prohibited from making an assignment, or confessing any judgment, to enable other creditors or persons to obtain a preference over the plaintiff, or to take any portion of the defendant's property.

(d) That a receiver be appointed of all said property, equitable interests, things in action, and effects of defendant, and that the defendant be directed to execute to him an assignment thereof, and that said receiver sell or otherwise dispose of the same, and convert the same into money as soon as may be, and apply so much of the proceeds thereof as may be necessary for that purpose to the payment of the indebtedness upon said judgment, with interest and costs of this action.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 958—Against judgment debtor and his assignee, to set aside fictitious assignment made to delay and defraud creditors.

[Title of court and cause.]

[Introductory part.]

1-4. [As in form No. 957.]

5. That after the contracting of the debt on which the aforesaid judgment was recovered, the said Y. Z. [judgment debtor] executed and delivered to the defendant W. X. an assignment of all his property in trust for the payment of his debts [of which a copy is hereto annexed, marked "Exhibit A" (or "Schedule A")] and made a part of this complaint [or petition], to which assignment the said W. X. assented in writing, which assent was embraced therein [or endorsed thereon].

6. [Aver recordation of such assignment, if the same included real property, or if, as to any other property, the law requires recording.]

7. That the said W. X. accepted said trust, and has collected a large sum of money and other property from the assets so assigned, amounting in all to the sum of more than \$.

8. That the said assignment was made by the said Y. Z. with the intent to hinder, delay, and defraud his creditors; that it was not accompanied by an immediate and continued change of possession of the property; that since the same was executed and delivered, and up to the present time, the said property has remained in the actual possession and under the control of said Y. Z., who has retained possession and control thereof under the false and fraudulent pretense that he is the agent of said W. X.

9. That the pretended indebtedness set forth in said assignment as due from said Y. Z. to the defendant L. M. [preferred creditor], is fictitious; that in fact no such indebtedness exists, but that the same is therein inserted for the purpose of enabling said Y. Z. to distribute the proceeds of the goods passed under the assignment among his friends, and thereby to keep possession and control thereof himself.

10. That the defendant Y. Z. has not any other property than that embraced in the assignment aforesaid, out of which the said judgment could be satisfied in whole or in part; that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

[Concluding part.]

FORM No. 959—To set aside fraudulent conveyance of real estate made by judgment debtor.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , a judgment was duly given and made in and by the court of the state of , in the county of , in favor of the plaintiff and against the defendant [naming the judgment debtor], for \$; that said judgment was duly entered and docketed by the clerk of said court on the same day. [That a certified transcript of said docket of said judgment was thereafter, to wit, on the day of , 19 , filed for

record and recorded in the office of the county recorder of the county of in this state.]

2. That thereafter an execution was issued to enforce said judgment, dated and issued on the day of , 19 , delivered to , the sheriff of said county of , said county being the residence of the said defendant debtor at the time of the rendition of said judgment. [Aver issuance of execution to the sheriff of any other county.]

3. That before this action was commenced, said execution was [or executions were] duly returned to said court wholly unsatisfied, and said judgment is now, and during all times herein has been, wholly unpaid and unsatisfied.

4. That on or about the day of , 19 , and prior to the entry of said judgment, but after the indebtedness upon which said judgment was rendered had been incurred, the defendant [judgment debtor], for the purpose of defrauding the plaintiff, and to prevent him from collecting the indebtedness, conveyed to the defendant [transferee], certain real estate of said defendant [judgment debtor], and situate in said county of , in this state, and described as follows, to wit: [Here describe]; that said real estate was not then, and never since has been, exempt from execution; that defendant [transferee] knew of said indebtedness of defendant [judgment debtor] to plaintiff, and received said conveyance so made with the intent and purpose of defrauding the plaintiff, and with the intent and purpose of preventing the plaintiff from collecting said indebtedness and the aforesaid judgment, or any judgment that might be rendered therein.

5. That there was no consideration for said conveyance of said real estate [if there was a pretended or merely nominal consideration, so state, and allege facts showing the same to have been such, and fraudulent]; that the defendant [judgment debtor] had, after he made said conveyance, no property standing in his name, or any other property, out of which the said judgment of plaintiff could be satisfied in whole or in part.

Wherefore, plaintiff prays judgment against the defendants: That defendant [transferee] be required to deliver up said conveyance of said real estate, and that the same be canceled and declared void, and the record thereof of no effect as against the plaintiff herein; that said defendants, and each of them, be enjoined from

disposing of, transferring, or encumbering said real estate; that an alias execution be issued out of this court directed to the sheriff of said county of _____, empowering and commanding him to sell said real estate to satisfy said judgment, or so much thereof as may be necessary to satisfy the same; and for such other or further relief as the court may deem just and equitable, and for costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 960—Against judgment debtor, to set aside fraudulent judgment and sale.

[Title of court and cause.]

[Introductory part.]

1-4. [As in form No. 957.]

5. That prior to the entry of the said judgment, but after the indebtedness upon which the aforesaid judgment was rendered had accrued, the defendant Y. Z. authorized a judgment to be entered, on confession, in the _____ court, against him, in favor of the defendant W. X., for the sum of \$ _____, damages and costs, for a pretended debt of that amount, for money alleged to have been previously lent and advanced by said W. X. to the said Y. Z.

6. [Here allege the facts as to execution and sheriff's sale under said judgment.] * * * That no deed or conveyance has yet been executed by said sheriff, the time for such conveyance not yet having arrived.

7. That the said last-mentioned judgment was fraudulently confessed by the said Y. Z. to the said W. X., and for the purpose of covering up his said property and defrauding the plaintiff in the collection of his said debt and demand; that said Y. Z. was not indebted to the said W. X. in said sum of \$ _____, for which said judgment was so confessed, or in any other sum, but said judgment was confessed without any consideration, and the sale of the said property made with the full knowledge and concurrence of the defendant W. X., with the intention and design of cheating and defrauding this plaintiff out of his said debt and demand, and of transferring the ostensible ownership and possession of the property of said Y. Z. liable to execution to the defendant W. X., so as to prevent this plaintiff, or any other creditor, from levying upon and

selling the whole or any part of said property, in satisfaction of his or their debt or debts and demands.

8. That the said real estate can not be sold for a sum more than about one-half of the plaintiff's said judgment, and that the defendant W. X. is a man of no pecuniary responsibility, and is possessed of no property other than that so bid in by him as aforesaid.

Wherefore, the plaintiff demands judgment against the defendants: That the said judgment in favor of the said Y. Z. against the said W. X., and the proceedings and sale under it, including the sheriff's said certificate of sale, be set aside, vacated, and declared null and void [etc.].

§ 404. ANSWERS.

FORM No. 961—Denying return of execution.

[Title of court and cause.]

Defendant answers to plaintiff's complaint [or petition]:

Denies that execution upon the said judgment was ever returned unsatisfied in whole or in part before the beginning of this action [etc.].

FORM No. 962—Denying possession of property belonging to the debtor.

[Title of court and cause.]

Defendant answers to plaintiff's complaint [or petition]:

Denies that he had at the commencement of this action, or at any time since, any property of the defendant [debtor] in his possession or under his control, as alleged, or at all.

FORM No. 963—Averment in defense that defendant has assets.

[Title of court and cause.]

Defendant answers to plaintiff's complaint [or petition]:

Alleges that the defendant [judgment debtor] has, and at the commencement of this action had, property in this county subject to execution, and sufficient to satisfy said judgment, to wit: [State what property.]

FORM No. 964—Denial that conveyance was fraudulent.

[Title of court and cause.]

Defendant answers to plaintiff's complaint [or petition]:

[After denials, aver:]

That upon the making of the alleged assignment [or mortgage] there was an actual and continued change of the possession of the assigned [or mortgaged] property from the said [debtor] to the [transferees], who, immediately after the execution of the assignment [or mortgage] took actual and exclusive possession of the property; and that it has at all times since the assignment [or mortgage] remained in their exclusive protection and control.

FORM No. 965—Defense that deed was made for a valuable consideration.—

Action to set aside alleged fraudulent conveyance.

(In *Lynch v. Sweetland*, 8 Cal. App. 582; 97 Pac. 413.)

[Title of court and cause.]

[After introductory part and denials appropriate to this defense:]

7. Defendants aver that upon the 30th day of December, 1897, defendant William Sweetland was indebted to defendant Emma Sweetland for moneys had and received by the said William Sweetland from the said Emma Sweetland, which said moneys were the separate estate of the said Emma Sweetland, and which said moneys so by the said William Sweetland received from the said Emma Sweetland were used by the said William Sweetland in the original purchase by the said William Sweetland of the said premises in said complaint described; that said purchase was made by the said William Sweetland from one Mrs. Catherine Dunne, on or about the 14th day of February, 1895; that at the time of the said conveyance from said William Sweetland to Emma Sweetland, there was a large sum of money still due for the purchase price thereof, and the said premises were then encumbered to secure the payment thereof; that since the making, execution, and delivery of said conveyance by the said William Sweetland to said Emma Sweetland, the said Emma Sweetland, with her own separate personal funds, money, and estate, has paid off said indebtedness, and the true consideration for the making, execution, and delivery of said conveyance from the said William Sweetland to the said Emma Sweetland was for moneys loaned by the said Emma Sweetland to the said William Sweetland, and the assuming by the said Emma Sweetland of the obligation and indebtedness for the balance of the purchase price for said premises, which said obligation and indebtedness the said Emma Sweetland assumed and paid, and the consideration for said conveyance was both good, valid, sufficient, and legal.

8. Defendants allege that immediately after the making, execution, and delivery of said deed of conveyance, namely, on or about the 30th day of December, 1897, the defendant Emma Sweetland took immediate, absolute, and exclusive possession, management, and control of all of the said property mentioned in said conveyance and in said complaint described, and she has ever since had, and now has, absolute and exclusive management, possession, and control of said property.

9. Defendants aver that said deed was not made solely, or at all, with the intent to defraud this plaintiff, or with intent to defraud any other person or persons [etc.].

Wherefore, defendants pray that plaintiff take nothing by his said action, and that they have judgment for costs herein expended.

E. D. Crawford, and

R. A. Herrington,

Attorneys for defendants.

§ 405. JUDGMENTS [OR DECREES].

FORM No. 966—Confirming deed in action to set aside the same as an alleged fraudulent conveyance.

(In *Lynch v. Sweetland*, 8 Cal. App. 582; 97 Pac. 413.)

[Title of court and cause.]

This cause came on regularly for trial on the 28th day of July, 1905, all parties being present and represented by counsel, and evidence was introduced for the respective parties, and the cause being thereafter, upon the 25th day of August, 1905, submitted for decision, and the court being fully advised, and having given and made its findings of fact and conclusions of law; now, upon motion of attorneys for defendants:

It is ordered, adjudged, and decreed, and the court does now here order, adjudge, and decree, that the conveyance of the premises mentioned in plaintiff's complaint herein was made and executed upon the 30th day of December, 1897, and was delivered in the month of January, 1898, by defendant William Sweetland to defendant Emma Sweetland; that the same was made for a good and valuable consideration, and was not made with intent to defraud the plaintiff, and was not made with intent of defrauding any existing or subsequent creditor or creditors of said William Sweetland, and

the same was and is in no wise fraudulent as to the above-named plaintiff.

It is further ordered, adjudged, and decreed, that defendants have judgment for their costs herein, taxed at \$.

Dated this 23d day of February, 1906.

M. H. Hyland,
Judge of Superior Court.

FORM No. 967—Following order sustaining demurrer to complaint and refusal to amend.—Action in the nature of a creditor's bill.

(In Phillips v. Price, 153 Cal. 146; 94 Pac. 617.)

The demurrer of the defendants to the plaintiff's complaint herein having been, on the 19th day of May, 1904, sustained by order of this court, and plaintiff herein having in open court declined to amend his complaint: It is hereby ordered and adjudged, that plaintiff herein take nothing by this action, and that this action be and the same is hereby dismissed, and that defendants herein recover their costs, taxed at \$3.00.

U. P. Unangst,
Judge of Superior Court.

Form of complaint in an action to set aside alleged fraudulent conveyance: *Blanc v. Paymaster Min. Co.*, 95 Cal. 524, 527, 30 Pac. 765, 29 Am. St. Rep. 149.

Form of complaint in an action to set aside an alleged fraudulent assignment: *Martin v. Atchison*, 2 Idaho (Hasb.) 624, 2 Idaho (W. P. Co.) 590, 33 Pac. 47.

Form of answer in an action to set aside a fraudulent conveyance: *National Wall Paper Co. v. McPherson*, 19 Mont. 355, 48 Pac. 550, 551.

For substance of answer in an action for alleged conspiracy to cheat and defraud creditors, in which answer, after traversing the material allegations of the complaint, the defense was set up that the defendants became possessed of the property in question under a sale thereof as a pledge to secure a promissory note, in the manner required by law; also, a defense based upon a judgment pleaded by way of estoppel, and rendered in an action for an accounting between the parties, see *Lane v. Tanner*, 156 Cal. 135, 136, 103 Pac. 846.

§ 406. ANNOTATIONS.—Fraudulent transfers and assignments.—Creditors' suits.

1. General creditor.—Right to maintain action.
2. Exception to rule as to general creditor.
- 3, 4. Fraudulent intent.—Rule as to pleading.
5. Intent to hinder, delay, and defraud.
6. Proceeding by creditor's bill when other proceedings are inadequate.
7. Creditor's suit to reach assets.
8. Assignment antedating judgment.

1. General creditor.—Right to maintain action.—A general creditor may, without reducing his claim to judgment, proceed in equity to charge one holding

the property of his debtor, received under a fraudulent assignment or transfer, as a trustee for the benefit of creditors: *Barrie v. United Railways*, 138

Mo. App. 557, 119 S. W. 1020, 1061, citing and quoting the rule laid down by Mr. Justice Brewer, then judge of the United States Circuit Court, in *Clapp v. Dittman*, 31 Fed. 15, quoting *Case v. Beauregard*, 101 U. S. 688, 25 L. ed. 1004.

2. Exception to rule as to general creditor.—It is the general rule that a creditor must reduce his claim to a judgment before he can maintain an action to set aside a fraudulent conveyance. But to this rule there is a well-established exception: Where the defendant is a non-resident, a personal judgment can not be obtained against him, and therefore such action can be maintained without the creditor first having obtained a judgment: *First National Bank v. Eastman*, 144 Cal. 487, 77 Pac. 1043, 103 Am. St. Rep. 95, 1 Am. & Eng. Ann. Cas. 626; *Taylor v. Branscombe*, 74 Iowa 534, 38 N. W. 400; *Pendleton v. Perkins*, 49 Mo. 565; and cases cited in note to 1 Am. & Eng. Ann. Cas. 626, 630.

3. Fraudulent intent.—Rule as to pleading.—It is generally necessary in an action to set aside a fraudulent conveyance that there be an express allegation of fraudulent intent, although there is a line of authorities holding that an express allegation of fraud is unnecessary where the allegations of fact are such that only one inference can be drawn therefrom, namely, that the parties were moved with an actual fraudulent intent in doing the acts complained of: *Byrne etc. D. G. Co. v. Willis-Dunn Co.* (S. Dak.), 121 N. W. 620, 622, citing and reviewing the cases and distinguishing the authorities on this point.

4. Fraudulent intent in an action to set aside a fraudulent conveyance must be pleaded either directly or by the averment of facts from which such intent is conclusively presumed as a matter of law: *Byrne etc. D. G. Co. v. Willis-Dunn Co.* (S. Dak.), 121 N. W. 621, 622; *Kingman v. Mowry*, 182 Ill. 256, 55 N. E. 330, 74 Am. St. Rep. 169. See *Albertoli v. Branham*, 80 Cal. 631, 22 Pac. 404, 13 Am. St. Rep. 200.

5. Intent to hinder, delay, and defraud.—A general averment that the intention

was to hinder, delay, and defraud creditors is not sufficient: *Meeker v. Harris*, 19 Cal. 278, 289, 79 Am. Dec. 215. See *King v. Davis*, 34 Cal. 106; *Lawrence v. Gayetty*, 78 Cal. 126, 131, 20 Pac. 332, 11 Am. St. Rep. 29; *People v. McKenna*, 81 Cal. 158, 159, 22 Pac. 488; *Spring Valley W. Works v. San Francisco*, 82 Cal. 236, 321, 22 Pac. 910, 1046, 16 Am. St. Rep. 116, 6 L. R. A. 756.

6. Proceeding by creditor's bill when other proceedings are inadequate.—Proceedings supplementary to execution are not an adequate remedy when they can not in themselves, without the aid of an independent action, result in subjecting the property—whether tangible or a mere chose in action—to the payment of plaintiff's claim. Such condition exists wherever it appears that the person who is charged with holding property belonging to the judgment debtor, or with being indebted to him, claims title to the property or denies the deed. In such cases an action is necessary, and the plaintiff may proceed by creditor's bill without first pursuing statutory proceedings, which could not give him anything more than a right to sue: *Phillips v. Price*, 153 Cal. 146, 150, 94 Pac. 617.

7. A creditor's suit to reach assets of a street railway company, and brought to charge against such assets a judgment which plaintiff obtained against the company, in whose hands the assets formerly were, may be maintained whether the consideration was adequate, or whether no consideration whatever was paid, under the facts as disclosed: *Barrie v. United Railroads*, 138 Mo. App. 557, 119 S. W. 1020, 1048.

8. Assignment antedating judgment.—If an assignment for the benefit of creditors made by a corporation antedates a judgment against the corporation, such judgment does not become a lien upon the property, if the assignment was valid, and the assignee's deed under such assignment transferring the title is a complete defense to an action brought by persons claiming under a sheriff's deed: *Lacy v. Gunn*, 144 Cal. 511, 514, 73 Pac. 30.

Conversion and Trover.

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FORM No. 968—For conversion. (Common form.)

The plaintiff complains of the defendant, and alleges:

2. That on said day, at _____, the defendant took and carried away the said goods, and unlawfully converted and disposed of the same to his own use, to the damage of the plaintiff in the sum of \$ _____.

[Concluding part.]

FORM No. 969—Goods in defendant's possession.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , plaintiff was the owner of [briefly describe property], of the value of \$, and was then entitled to the immediate possession thereof.

2. That on the day of , 19 , at , the defendant, then being in possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 970—By assignee of claim, for conversion and damages.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That before and until the time first hereinafter mentioned, one C. D. was lawfully possessed of [or was entitled to the immediate possession of (describe goods),] the property of the said C. D., of the value of \$.

2. That on the day of , 19 , at , the defendant, being then in possession of said goods, unlawfully converted them to his own use, to the damage of the said C. D. in the sum of \$.

3. That on the day of , 19 , the said C. D. assigned to the plaintiff his claim against the defendant for damages for said conversion.

[Concluding part.]

FORM No. 971—By seller against fraudulent buyer of goods.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the defendant falsely and fraudulently represented to the plaintiff that one C. D. was solvent, and worth \$ over all his liabilities.

2. That the plaintiff, relying on said representations, was thereby induced to sell to the said C. D. [description of goods], of the value of \$.

3. That the said representations were false, and were then known by the defendant to be so, and were made by him with intent to deceive and defraud the plaintiff.

4. That the defendant having so obtained possession of said goods from the plaintiff, unlawfully converted and disposed of them to his own use, to the damage of the plaintiff in the sum of \$.

[Concluding part.]

FORM No. 972—Goods taken from possession of bailee.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That at the time hereinafter mentioned the plaintiff was and still is the owner of [describing the goods], said goods being then in the possession of C. D., with whom the plaintiff had left the same for safe-keeping [or otherwise, as the case may be].

2. That on the day of , 19 , the defendant wrongfully took said goods from the possession of the said C. D., and still detains the same from the plaintiff without his consent, to his damage in the sum of \$.

3. That thereafter, and before this action, to wit, on the day of , 19 , the time which the said C. D. was safely to keep said goods had expired, and thereupon the plaintiff became entitled to the immediate and exclusive possession thereof.

[Concluding part.]

FORM No. 973—For conversion of a promissory note.

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1. That on the day of , 19 , at , the plaintiff executed his promissory note, of which the following is a copy: [Insert copy]; which note was made and delivered by the plaintiff to C. D. without consideration, and for his accommodation, and with the special purpose and agreement between the plaintiff and said C. D. that [set out purpose].

2. That said note was thereafter offered by said C. D. to the Bank of for discount; that said bank refused to discount the same, and returned it to the said C. D., whereupon the plaintiff became entitled to its possession.

3. That thereafter, but before maturity of the note, the defendant W. X., without the knowledge or consent of the plaintiff or of C. D., unlawfully took the said note from the possession of C. D. and delivered it to the defendant Y. Z., and that the defendants thereupon

converted and disposed of it to their own use, whereby the plaintiff was compelled to pay said note, to his damage in the sum of \$.
[Concluding part.]

FORM No. 974—For conversion of a bond.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , one C. D. was the owner of a certain bond, a copy of which is hereto annexed, marked "Exhibit A," and made a part of this complaint, and by his agent, at the request of the defendant, deposited it with the defendant for the purpose of [set out purpose for which deposited].

2. That after a reasonable time for [set out purpose], and on the day of , 19 , at , the said C. D. demanded from the defendant the said bond or its value, but the defendant refused either to return it or to pay its value to the said C. D., to his damage in the sum of \$.

3. That on the day of , 19 , at , the said C. D. duly assigned said bond to the plaintiff, together with all his right of action against the defendant and all other persons to recover its value or its possession or damages.

4. That the value of said bond at the time of said demand was \$.

[Concluding part.]

FORM No. 975—By executor [or administrator], for conversion.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. [As in paragraph 1, form No. 970.]

2. [As in paragraph 2, form No. 970.]

3. That the said goods were at the date of the taking and wrongful detention thereof aforesaid [and now are] of the value of \$.

4. That thereafter, and before the commencement of this action, the said C. D. died testate [or intestate], and on the day of , 19 , after due proceedings had, letters testamentary [or of administration] upon the estate of said C. D., deceased, were, by an order duly given and made by the court of the county of , of this state, ordered issued and granted to the plaintiff upon his qualifying as such executor [or administrator]; that the plaintiff

thereafter and thereupon duly qualified as such executor [or administrator], and entered upon the discharge of the duties of said officer, and he now is such executor [or administrator].

5. [Aver demand, except where taking is wrongful, as follows: "That on or about the day of , 19 , the said C. D. (or the plaintiff) demanded the delivery of said goods from the defendant, but defendant then and ever since has refused to deliver the same."']

[Concluding part.]

FORM No. 976—Against an attorney, for conversion of money collected.

(In *Fletcher v. Cummings*, 33 Neb. 793; 51 N. W. 144.)

[Title of court and cause.]

Plaintiff says that this case comes into this court on appeal from a judgment of the county court of this county; that on the day of , 19 , defendant had in his possession money collected by him as the attorney for this plaintiff, the property of the plaintiff, in the sum of \$145; that defendant was entitled to retain of the amount the sum of \$ for services rendered this plaintiff, and no more, and plaintiff was entitled to the immediate payment of the remaining sum of \$; that on the day of , 19 , the defendant converted said sum of [stating the amount of said surplus] to his own use, and neglected and refused to pay the same to the plaintiff, though requested so to do.

Since the judgment on this case was rendered in the county court the defendant has paid thereon the sum of \$, and no more.

There is now due from the defendant to the plaintiff, of said money wrongfully converted by the defendant to his own use, the sum of \$, with interest thereon from , 19 .

Wherefore, plaintiff prays judgment against the defendant for said sum of \$, with interest as aforesaid and costs.

A. B., Attorney for plaintiff.

FORM No. 977—Against warehouseman, for conversion and damages.

(In *Shedoudy v. Spreckels Bros. C. Co.*, 9 Cal. App. 398; 99 Pac. 535.)

[Title of court and cause.]

Comes now the plaintiff in the above-entitled action, and for cause of action and by way of amended complaint complains of the defendant and alleges:

1. That defendant is, and at all times mentioned in this amended complaint has been, a corporation duly organized and incorporated, having a place of business in the city of Los Angeles, county of Los Angeles, state of California.

2. That on the 24th day of April, 1906, plaintiff was the owner of a certain case of goods of the value of \$1,400, and was then entitled to immediate possession of the same.

3. That on or about the 24th day of April, 1906, defendant, then being in possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of the plaintiff in the sum of \$1,400.

And for a second and separate cause of action plaintiff further complains and alleges:

1. That defendant carries on, and at all times mentioned in this complaint has carried on, the business of warehouseman in the city of Los Angeles, county of Los Angeles, state of California.

2. That the plaintiff was at all times mentioned in this complaint the owner and entitled to the immediate possession of a certain case of goods, of the value of \$1,400.

3. That on or about the 7th day of August, 1905, the said goods were deposited with the defendant at the defendant's warehouse in the city of Los Angeles by the Atchison, Topeka, and Santa Fe Railway Company, to be held and stored by defendant on behalf of the plaintiff.

4. That on or about the 7th of November, 1905, defendant represented to plaintiff that it was then holding and storing the goods on behalf of the plaintiff, and it was thereupon agreed between plaintiff and defendant, and defendant agreed and undertook, that it would continue to store said goods for and on behalf of the plaintiff, and would deliver the said goods to the plaintiff's order at any time upon plaintiff's paying to defendant the sum of \$2.50, being the amount of freight on said goods paid by defendant on behalf of plaintiff to said railway company, and storage charges due to defendant on said goods up to said 7th of November, 1905, together with whatever further storage charges should have become due at the time of delivery of said goods, at the rate of twenty-five cents per month.

5. That nevertheless on or about the 24th day of April, 1906, the defendant, without any further communication whatever to the

plaintiff, wrongfully sold and parted with the possession of the said goods.

6. That defendant has ever since refused, and still refuses, to deliver said goods to plaintiff, or to pay plaintiff the value of said goods so wrongfully sold and disposed of, though plaintiff has often demanded of defendant so to do.

Wherefore, plaintiff prays judgment against defendant for the sum of \$1,400, being the market value of said goods at the time of their sale and disposition by defendant, and for interest thereon from the said date to the present time, and for such further relief as plaintiff may be entitled to on the facts hereinbefore set out, and that defendant be ordered to pay the costs of this suit.

Conkling & Bretherton,
Attorneys for plaintiff.

FORM No. 978—For malicious conversion, and damages resulting therefrom.

(In Shandy v. McDonald, 38 Mont. 393; 100 Pac. 203.)

[Title of court and cause.]

[After the usual averments of ownership and possession by plaintiff, of the property converted,—in this case a team, etc.,—and of the value of the property, fixed at \$1,600, the complaint proceeds:]

That on July 19, 1905, the plaintiff, being in lawful possession of [said team], together with another large team and a heavy wagon and harness, was on his way to fulfil a teaming contract into which he had entered [with one , and of the date of , 19 ,] requiring the use of all of said property; that defendants, well knowing that plaintiff was not indebted to them in any way, that they had no right or interest in the property, or any right to take or detain it, and also that plaintiff was required to use it in order to fulfil his said contract, which would yield to him a profit of \$500 within sixty days, [wrongfully,] fraudulently, and maliciously to obtain the use of it for themselves, and to deprive the plaintiff of it and put him to great inconvenience, expense, and loss of time, [wrongfully,] maliciously, fraudulently, and oppressively, and against the wishes and protests of plaintiff, took and carried it away, converting and disposing of it to their own use, to the damage of plaintiff in the sum of \$3,000.

[It is further alleged in the complaint that plaintiff spent thirty days in the pursuit of his property, besides incurring an expense and expending \$300 in money, and that the time so spent was reasonably

worth \$500. It is also alleged that at various times between July 20 and August 20, 1905, plaintiff demanded the return to him of his said property, but that his demand was in each instance refused, except that on August 3 there was returned to him a designated portion of said property.]

[Judgment prayed for in the sum of \$3,800, and costs of the action.]

§ 408. ANSWERS.

FORM No. 979—Denial of conversion.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that he converted the goods mentioned therein, or any thereof, to his own use, and denies further that he ever at any time refused to deliver the same to the plaintiff.

FORM No. 980—Denial of taking.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies he took or carried away said goods, or any thereof, at any time, or at all.

[Etc.]

FORM No. 981—Denial of ownership.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that at the time of the alleged conversion, or at any time [since the day of , 19 ,] plaintiff was the owner, or that he was entitled to the immediate or any possession, of the goods, wares, or merchandise mentioned in the complaint [or petition], or any thereof. [Allege ownership in the defendant or in third person through whom defendant derives his right.]

[Concluding part.]

FORM No. 982—Denial of assignment of cause of action.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that said C. D. or E. F., or either of them, ever assigned to the plaintiff their right, title, or interest in or to the [designate

property] mentioned in the complaint [or petition], or in or to any claim, demand, or cause of action arising to said C. D. and E. F., or either of them, for the alleged detention or loss of said [designating property].

[Set forth any other defense.]

[Concluding part.]

Form of petition in an action for conversion of certain personal property: *Cone v. Iverson*, 4 Wyo. 203, 33 Pac. 31, 35 Pac. 933.

Form of petition in an action by the pledgee of a note as collateral against the pledgee, for conversion: *Hallack L. & M. Co. v. Gray*, 19 Colo. 149, 34 Pac. 1000, 1001.

Form of complaint in an action of trover and conversion against an assignee under a general assignment for the benefit of creditors, of property covered by a chattel mortgage: *Case T. M. Co. v. Campbell*, 14 Ore. 460, 462, 13 Pac. 324, 325.

§ 409. ANNOTATIONS.—Conversion and trover.

1. Elements of an action for conversion.
2. Allegation of fact of conversion.
3. Averment of ownership.
- 4, 5. Complaints deemed sufficient.
- 6, 7. Fraudulent conversion.—Remedies of party defrauded.
- 8, 9. Rule as to pleading fraud.—When not applicable.
10. Demand.—When not necessary.
11. Conversion by carrier.—Stoppage in transitu.
12. Trover at common law.
- 13, 14. Rule as to property severed from the soil.—When owner may maintain trover.
15. Unlawful sale of note's collaterals.—Complaint.
- 16, 17. Measure of damages in trover and conversion.
18. Plea of former adjudication.

1. Elements of an action for the conversion of personal property as ordinarily alleged in a complaint are: (1) Ownership and right to possession by plaintiff of the property on a day named; (2) wrongful detention and conversion to defendant's own use of said property on that date; (3) market value of said property; (4) demand for the return thereof, and refusal by defendant to comply therewith; (5) consequent damage, and non-payment of the same or any part thereof: *Wendling L. Co. v. Glenwood L. Co.*, 153 Cal. 411, 412, 95 Pac. 1029.

2. Allegation of fact of conversion.—An allegation that the defendants "converted and disposed of the property to their own use" is an allegation of these facts sufficient, in the absence of a special demurrer, to sustain a judgment: *Daggett v. Gray*, 110 Cal. 169, 42 Pac. 568; *Lowe v. Ozmun*, 137 Cal. 257, 260, 70 Pac. 87.

3. An averment of ownership of property in an action for conversion is sufficient as against a general demurrer, although not essential in this form, where it is necessarily implied from other averments in the pleading that the plaintiff is the owner: *Lowe v. Ozmun*, 137 Cal. 257, 261, 70 Pac. 87.

4. Complaint deemed sufficient.—A complaint, in substance, alleges that the plaintiffs were the owners of the note in question, that it was wrongfully taken and converted by the defendant, and that the reasonable market value thereof was \$108.72; held, sufficient against a general demurrer: *Capps v. Vasey Bros.*, 23 Okla. 554, 101 Pac. 1043, 1045.

5. A complaint is sufficient if it, in substance, alleges that the defendant took the plaintiff's property, describing it, and refused to return it on demand, and alleges the statutory measure of damages for conversion: *Arzaga v. Vill-*

alba, 85 Cal. 191, 196, 24 Pac. 656. See *Wood v. McDonald*, 66 Cal. 546, 548, 6 Pac. 452; *Doyle v. Callaghan*, 67 Cal. 154, 7 Pac. 418.

6. **Fraudulent conversion.**—It is the general rule in actions for the conversion of personal property, where the property has been procured by fraud, that it is not necessary to allege the fraud, but it is sufficient to declare generally that the property was wrongfully converted: *Salisbury v. Barton*, 63 Kan. 552, 66 Pac. 618; *Pekin Plow Co. v. Wilson*, 66 Neb. 115, 92 N. W. 176; *Hunter v. Hudson R. Co.*, 20 Barb. (N. Y.) 493; *Bliss v. Cottle*, 32 Barb. (N. Y.) 322; *Benesch v. Waggner*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254; *Wendling L. Co. v. Glenwood L. Co.*, 153 Cal. 411, 415, 95 Pac. 1029.

7. **Remedies of the party defrauded** are either trover, or replevin in the detinet, or trespass, or replevin in the cepit, at his election: *Amer. v. Hightower*, 70 Cal. 440, 11 Pac. 697, (replevin); *Wendling L. Co. v. Glenwood L. Co.*, 153 Cal. 411, 414, 95 Pac. 1029, (fraudulent conversion).

8. **Rule as to pleading fraud.**—When not applicable.—The rule that where fraud is relied on by a party he must allege it is not applicable in an action brought upon the theory that the vendor is the owner and entitled to the possession of the property, and that the defendant unlawfully withholds possession thereof, or has converted the same to his own use. Under the general allegations of ownership and right of possession, and unlawfully withholding or conversion, evidence is admissible in proof of any facts sustaining such claim: *Wendling L. Co. v. Glenwood L. Co.*, 153 Cal. 411, 414, 95 Pac. 1029, (fraudulent conversion); *Butler v. Collins*, 12 Cal. 457; *Amer. v. Hightower*, 70 Cal. 440, 11 Pac. 697, (replevin).

9. This modification of the rule in actions involving fraud rests upon the principle that, as between the vendor and fraudulent vendee, or a person taking from such fraudulent vendee with notice of the fraud or without consideration, the sale may, at the election of the vendor promptly made, be treated as an absolute nullity: *Wendling L. Co. v. Glenwood L. Co.*, 153 Cal. 411, 417, 95 Pac. 1029, (on rehearing).

10. No demand is necessary before bringing an action of trover for goods

described in a bill of lading: *Dodge v. Meyer*, 61 Cal. 405, 421.

11. **Conversion by carrier.**—**Stoppage in transitu.**—Upon demand by a vendor, while the right of stoppage in transitu continues, a carrier will become liable for conversion of goods if he declines to redeliver them to the vendor, or delivers them to the vendee: *Markwald v. Creditors*, 7 Cal. 213; *Blackman v. Pierce*, 23 Cal. 508; *Jones v. Earl*, 37 Cal. 630, 632, 99 Am. Dec. 388; *Memphis etc. R. Co. v. Freed*, 38 Ark. 614; *O'Neil v. Garrett*, 6 Iowa 480.

12. **Trover at common law.**—While the code abolishes the distinction between different forms of action, a complaint for conversion of property under the code must now contain all the material allegations which were necessary in an action in trover at common law: *Sigel-Campion etc. Co., v. Holly*, 44 Colo. 530, 101 Pac. 68, 70.

13. **Rule as to property severed from the soil.**—It is recognized as a general rule that the title to property which has become personalty by reason of its severance from the soil or freehold, as in case of timber felled, ore mined, stone quarried, etc., depends upon the ownership of the real estate from which it was severed. The owner of the real estate, if out of possession, can not maintain trover for such property where the severance was made by a person holding adversely to such owner and in good faith under claim and color of title, since such an action, if permitted, would result in a determination of the title to real estate between conflicting claimants in a transitory action. The remedy of the true owner in such a case is by ejectment to recover possession and trespass for mesne profits: *Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460, 462, citing and construing the rule, as stated above, in 28 Am. & Eng. Ency. (2d ed.) 670.

14. **When true owner may maintain trover.**—After recovery of possession in ejectment, the true owner may maintain trover for property severed from the freehold by the disseisor while holding adversely: *Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460, 462, quoting the rule as stated in 28 Am. & Eng. Ency. (2d ed.) 671.

15. **Unlawful sale of note's collateral.**—**Complaint.**—After alleging the making and delivery of the note to defend-

ant for a certain amount, payable one day after date, with interest at the rate of one per cent per month from date until paid, said note reciting the deposit with defendant as collateral security of 500 shares of stock in a mining company and certain shares of stock in other companies, and reciting a provision whereby the defendant was authorized to sell, without notice, at public or private sale, in case of the non-payment of the note, and that the agreement by which defendant was authorized to sell should extend to any additional collaterals which might be deposited to secure the payment of the note, the following averment has been held sufficient to disclose the agreement relied upon, and the ground of mistake in that the agreement set forth in the written instrument did not conform to the one actually made between the parties, to wit: "That plaintiff deposited with the defendant the shares of stock mentioned in the note, and that it was not the intention of the parties that the portion of the printed form of the note providing for the sale of the collaterals without notice should remain as a portion of the contract, but that an erasure of that portion should have been made, and that it was not done; that plaintiff never authorized defendant to sell the collateral, or any part of it, without demand of payment of the note and a reasonable time and opportunity to redeem the collateral; that he never authorized a private sale of the collateral without notice to him of the time and place of the sale; that after the maturity of the note the defendant requested plaintiff to deposit with it an unrecorded United States patent to 160 acres of land, situate in Pueblo County, Colorado, as additional security, this patent having been issued to and standing in the name of the plaintiff; that in consideration of such deposit the defendant agreed that the time for the payment of the note would be extended indefinitely; that in consideration of this agreement plaintiff did deposit the patent with defendant; that defendant accepted the paper in accordance with the agreement, and still has possession of it; that the defendant at no time made any demand upon the plaintiff for the payment of the note, and gave the plaintiff no opportunity to

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redeem the securities; that upon the 10th day of January, 1899, without notice to the plaintiff, defendant sold and converted to its own use the 500 shares of stock of the Isabella Gold Mining Company; that this sale was made without advertisement or notice; that plaintiff was at all times able and willing to pay the note upon the return of the securities; that upon the 15th day of February, 1899, he made a tender to defendant of the amount due on the note, including interest, in gold coin of the United States, and demanded a return of the securities and title paper; that defendant refused to accept the tender, and refused to return the securities, or any of them; that the securities are worth \$2,500, and plaintiff demands judgment for the return of the securities and for \$2,500 damages": *Drake v. Pueblo National Bank*, 44 Colo. 49, 96 Pac. 999, 1000.

16. Measure of damages in trover.—In trover, the measure of damages is the fair market value of the property converted at the time of the conversion, and, in Colorado, an additional amount equal to the legal rate of interest upon such value from the time of conversion to the time of trial: *Omaha etc. R. Co. v. Tabor*, 13 Colo. 41, 59, 21 Pac. 925, 5 L. R. A. 236, 16 Am. St. Rep. 185; *Sigel-Campion etc. Co.*, 44 Colo. 580, 101 Pac. 68, 70.

17. Damages for conversion.—The cost of property is not the proper basis of estimating damages. The value at the time and place of conversion must be taken: *Greenebaum v. Taylor*, 102 Cal. 624, 627, 36 Pac. 957; *Yukon River S. B. Co. v. Gratto*, 136 Cal. 538, 541, 69 Pac. 252. See *Hamer v. Hathaway*, 33 Cal. 117.

18. A plea of former adjudication in an action involving ownership—such as trover or detinue—must aver that the question of title was actually decided in the former case, or was so involved that the judgment could not have been rendered without its determination. The only effect of such former judgment is to settle the rights of the parties up to that time; it cannot prevent the plaintiff from recovering on a title since acquired: *Pacific Live Stock Co. v. Isaacs*, 52 Ore. 54, 96 Pac. 460, 463, quoting the rule as stated in 9 Ency. Pl. & Pr. 624.

exclusive use in this state, may obtain protection for such lawful trade-mark or device by complying with the following requisites and requirements.

First. By making out and filing in the office of the secretary of state of this state, to be there registered or recorded, a statement specifying the names of the parties and their residence and place of business who desire the protection of the trade-mark, the class of merchandise, and particular description of goods comprised in such class, by which or to which the trade-mark has been or is intended to be appropriated; a description of the trade-mark itself or device, or combination of words, letters or figures or characters used or intended to be used as such, and the mode in which it has been or is intended to be applied and used, and the length of time, if any, during which the trade-mark has been in use.

Second. By making payment to the secretary of state, for the use of the state, of a fee of not less than twenty-five nor more than one hundred dollars, to be determined by the secretary according to a schedule of fees arranged with reference to the number of words, figures, characters, etc., contained in such statement, which schedule it is made the duty of the secretary to make and keep posted up in his office.

^{a2} Arkansas, § 7961. The certificate prescribed in the preceding section must, in order to create any right whatever in favor of the party filing it, be accompanied by a written declaration, verified by the person or by some member of the firm or officer of the corporation by whom it is filed, to the effect that the party claiming the protection for the trade-mark has a right to the use of the same, and that no other person, firm or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as might be calculated to deceive, and that the facsimiles presented for record are true copies of the trade-mark sought to be protected.

^{a3} Arkansas, § 7962. The secretary shall not receive and record any proposed trade-mark which is not and can not become a lawful trade-mark, or which is merely the name of a person, firm or corporation, unaccompanied by a mark sufficient to distinguish it from the same

name when used by other persons, or which is identical with a trade-mark appropriated to the same class of merchandise and belonging to a different owner, and already registered or received for registration, or which so nearly resembles such last-mentioned trade-mark as to be likely to deceive the public. But this section shall not prevent the registry of any lawful trade-mark rightfully in use on the first day of May, 1883.

^b Colorado, § 6838. Any person, corporation, firm or association of persons, organized for the promotion of the common welfare of its members, and the members of its order or society, in the manufacture or sale of any goods, wares or merchandise may adopt and use a label or trade-mark to indicate either the origin or ownership, or both the origin and ownership, of the goods, wares or merchandise, manufactured, sold or offered for sale within this state, by any such person, corporation, firm or the members of such association, order or society having a common interest in promoting the manufacture or sale of such goods, wares or merchandise; and any such person, corporation or firm, and each and every member of such association, order or society, shall have and be protected in the exclusive use of such label or trade-mark, adopted and used for the purpose aforesaid, on compliance with the following requirements:

First—Such person, corporation, firm or association, shall cause to be filed in the office of the secretary of state, a facsimile of such label or trade-mark, accompanied with a written statement, under oath, by such person, or the principal officer of such corporation or association, or some member of such firm, to the effect that the person, corporation, firm or association, in behalf of its members and the members of its order or society, claiming protection in the use of such label or trade-mark, is entitled to the exclusive use of the same; and, in case of an association organized for promoting the welfare of its members, and the members of its order or society, as aforesaid, then a general description shall be given of the class of persons for whom the protection is sought, sufficient to identify them, which may include all members of the order or society, of which the particular association claiming the protection, is a branch; and it must

also appear in such statement, that no other person, corporation, firm or association, has the right to use such label or trade-mark, either in the identical form presented, or in any such near resemblance thereto as would be likely to deceive the public; and also the principal place of business of such person, corporation or firm, and the name and location and purpose of such organized association, and also the class of goods, wares or merchandise to which such label or trade-mark is to be applied; provided, the secretary of state shall not file for record in his office any label or trade-mark, which is identical with any previously filed in his office, nor of such near resemblance to any such previously filed in his office, as to be likely to deceive the public; and, provided, also, that no exclusive rights shall be acquired under this act, to the use of the proper name of any article, or matter of mere description of the quality, value or condition of the article manufactured or sold; nor to the real name of the manufacturer of the article, as against another person of the same name, nor to the geographical name of the locality where the same is manufactured, as against another manufacturer in the same locality.

Second—The payment to the secretary of state of a fee of \$5.00 for filing and entering a description of the same upon the books of his office.

c1 Hawaii, § 2671. Any person or firm, or any corporation desiring to secure the exclusive use of any print, label or trade-mark intended to be attached or applied to any goods or manufactured articles, or to bottles, boxes or packages containing such goods or manufactured articles to indicate the name of the manufacturer, the contents of the packages, the quality of the goods or directions for use, may obtain a certificate of the registration of such print, label or trade-mark in the manner hereinafter provided.

c2 Hawaii, § 2672. Before any one shall receive a certificate of the registration of a print, label or trade-mark, he shall file in the office of the treasurer an application for the registration of such print, label or trade-mark, with a declaration verified by the oath of the applicant; or, if the application be made by a firm or corporation, by the oath of a member of such firm, or an officer of such corporation, that he is or they are,

the sole and original proprietor or proprietors, or the assign or assigns of such proprietor or proprietors of the goods or manufactured articles for which such print, label or trade-mark is to be used, and describing such goods and manufactured articles, and the manner in which such print, label or trade-mark is to be used. Said application shall be accompanied by two exact copies of such print, label or trade-mark.

c3 Hawaii, § 2673. Upon filing such application, the applicant or applicants shall pay to the treasurer a fee of five dollars.

c4 Hawaii, § 2674. Upon receiving such application so accompanied, and the payment of such fee, the treasurer shall cause the said print, label or trade-mark to be recorded in a book to be kept for that purpose, and shall issue to the applicant or applicants a certificate of registration under the seal of the treasury; and such certificate of registration shall secure to the applicant or applicants the exclusive use of the said print, label or trade-mark throughout the territory of Hawaii for the term of twenty years from the date thereof.

d Missouri, § 10365. If any mechanic, manufacturer, association or union of workingmen, or other person, shall wish to adopt any particular name, term, design or device as his or their trade-mark, to designate, make known or distinguish any article of goods, wares or merchandise by him or them manufactured or prepared, he or they may write out a description of such name, term, design or device, describing the same accurately, and sign and acknowledge the same before some officer competent to take the acknowledgment of deeds, and file the same, together with a facsimile of the name, term, design or device for registration in the office of the secretary of state, by leaving two copies, counterparts (of) [or] facsimiles thereof, with the secretary of state: said secretary shall deliver to such mechanic, manufacturer, association or union of workingmen or other person so filing the same, a duly attested certificate of the filing of the same, for which he shall receive a fee of one dollar: such certificate shall, in all suits and prosecutions under this chapter, be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and of the right of such mechanic, man-

ufacturer, association or union of workmen or other person to adopt the same. No label, trade-mark or form of advertisement shall be registered that in any way resembles, or would probably be mistaken for a label or trade-mark already registered.

• Nebraska, § 4175a. Every person or association or union of workmen or others that has adopted or shall adopt for their protection any label, trade-mark or form of advertisement, may file the same for record in the office of the secretary of state by leaving two copies, counterparts or facsimiles thereof with the secretary of state. Said secretary shall thereupon deliver to such person, association or union so filing the same a duly attested certificate of the record of the same, for which he shall receive a fee of two (\$2.00) dollars. Such certificate of record shall in all actions and prosecutions, under the following three sections be sufficient proof of the adoption of such label, trade-mark or form of advertisement, and the right of said person, association or union to adopt the same.

† Nevada, § 5040. When a person who has complied with the provisions of section two of this act, uses any peculiar name, letters, marks, device, figures, or other trade-mark or name, cut, stamped, cast or engraved upon, or in any manner attached to or connected with, any article, or with the covering or wrapping thereof, manufactured or sold by him, to designate it as an article of a peculiar kind, character, or quality, or as an article manufactured or sold by him, or if such trade-mark or name be so connected with any bottle, box, cask, or other thing used for holding such article, it shall be unlawful for any other person, without his consent, to use said trade-mark or name, or any similar trade-mark or name, for the purpose of representing any article to have been manufactured or sold by the person rightfully using such trade-mark or name, or to be of the same kind, character, or quality as that manufactured or sold by the person rightfully using such trade-mark or name.

‡ New Mexico, Laws 1905, p. 63, ch. 24, § 1. Any person or persons, firm, corporation or association who manufacture or deal in articles of a commercial nature and wish to retain the exclusive right to the use of a trade-

name, trade-mark or label shall make a description of the same in writing, accompanied by a facsimile of such trade-name, trade-mark, or label, which description and application must set forth the class or classes of merchandise to be covered by such trade-name, trade-mark or label, together with a statement that the applicant claims by priority of adoption and employment of the same, exclusive right to the use thereof. Such instrument shall be signed by at least one of the persons or by the officials of the company making application for registration, the whole duly acknowledged, and filed in the office of the secretary of the territory. For the filing of each application and issuing certificate thereof, the secretary shall collect a fee of \$5.00. The secretary shall keep a record of each trade-name, trade-mark, or label, and it shall be unlawful for any other person, firm, corporation or association to adopt a trade-name, trade-mark or label identical with or similar to one previously registered. A copy of such description of any trade-name, trade-mark or label, certified under the great seal of the territory of New Mexico, shall be prima facie evidence of the facts therein stated. (Enacted March 2, 1905.)

§ Oregon, § 4609. Any person, partnership, firm, or private corporation desiring to secure within this state the exclusive use of any name, mark, brand, designation, or description for any article of manufacture or trade, or for any mill, hotel, factory, machine-shop, or other place of business, shall deliver or cause to be delivered to the secretary of state a particular description or a facsimile of such mark, brand, name, designation, or description as he may desire to use.

|| Texas, Art. 318a. All manufacturers or dealers in carbonated goods, mineral waters, soda water, wine, cider, or other beverage, or manufacturers of medicine or other compound requiring the use of kegs, casks, barrels, boxes, syphons, bottles, or any other vessels for containers, upon which the names, brands, marks, or trade-marks, or other designation of ownership or proprietorship is stamped, engraved, etched, blown in, impressed, or otherwise produced upon such boxes, syphons, bottles, or any other vessels for containers, may file in the office of the county clerk of the county in which

the principal place or office of business is situated, a facsimile or description of the name or names, marks or devices, so used by such manufacturer or dealer in such wares herein enumerated, and cause such description to be published in a public newspaper published in such county for three successive weeks; and the act of so filing and causing to be recorded by the county clerk, and publishing, shall operate as a trade-mark, securing to the said manufacturer the full protection of the law as a trade-mark, entitling the said manufacturer to the sole and exclusive use in Texas of said mark, name, or device; for which services the clerk shall be allowed the sum of one dollar, to be paid by the party having such brands, etc., recorded.

12 Texas, Art. 318d. Every person, association or union of workmen, incorporated or unincorporated, that has heretofore or shall hereafter adopt a label, trade-mark, design, device, imprint or form of advertisement, shall file the same in the office of the secretary of state by leaving two copies, counterparts, or facsimiles thereof, with the secretary of state, and said secretary shall deliver back to such person, association or union so filing the same one of said copies, counterparts or facsimiles, along with and attached to a duly attested certificate of the filing of same, for which he shall receive a fee of one dollar from such person, association or union. Such certificate of filing shall in all suits and prosecutions under this chapter be sufficient proof of the adoption of such label, trade-mark, design, device, imprint or form of advertisement, and of the right of such person, association or union to adopt the same. No label, trade-mark, design, device, imprint or form of advertisement shall be filed as aforesaid that would probably be mistaken for a label, trade-mark, design, device, imprint or form of advertisement already of record; provided, that no person or association shall be permitted to register as a label, trade-mark, design, device, imprint or form of advertisement, any emblem, design or resemblance thereto that has been adopted or used by any charitable, benevolent or religious society or association without their consent, and provided, further, that all persons, institutions or associations now using a label, trade-mark, design, device, imprint or

form of advertisement shall have thirty days' time after this law takes effect in which to file such label, trade-mark, design, device, imprint or form of advertisement under the provisions of this law, before the same can be registered by others.

1 Utah, § 2720. The phrase "trade-mark," as used in this title, includes every description of word, letter, device, emblem, stamp, imprint, brand, printed ticket, label, or wrapper usually affixed by any mechanic, manufacturer, druggist, merchant, tradesman, association, or union, whether incorporated or unincorporated, to denote any goods to be goods imported, manufactured, produced, compounded, or sold by him, or by such association or union, other than any name, word, or expression generally denoting any goods to be of some particular class or description.

2 Washington, § 9492. Whenever any person, or any association or union of workmen has heretofore adopted or used, or shall hereafter adopt or use, and has filed as hereinafter provided any label, trade-mark, term, design, device or form of advertisement for the purpose of designating, making known, or distinguishing any goods, wares, merchandise or other product of labor, as having been made, manufactured, produced, prepared, packed or put on sale by such person or association or union of workmen or by a member or members of such association or union, it shall be unlawful to counterfeit or imitate such label, trade-mark, term, design, device or form of advertisement, or to use, sell, offer for sale, or in any way utter or circulate any counterfeit or imitation of any such label, trade-mark, term, design, device or form of advertisement.

1 Wisconsin, § 1747a. 1. Any person, firm, copartnership, corporation, association, or union of workmen, which has heretofore adopted or used or shall hereafter adopt or use any label, trade-mark, trade-name, term, design, pattern, model, device, shop-mark, drawing, specification, designation, or form of advertisement, for the purpose of designating, making known, or distinguishing any goods, wares, merchandise, or other product of labor or manufacture as having been made, manufactured, produced, prepared, packed, or put on sale by such person, firm, copartnership, cor-

poration, association, or union of workmen, or by a member or members thereof, he or they, if residents of this or any other state of the United States, and such foreign corporations as may have been duly licensed to transact business in the state of Wisconsin, may file an original, a copy, or photographs, or cuts with specifications of the same for record in the office of the secretary of state, by leaving two such originals, copies, photographs, or cuts with specifications, the same being counterparts, * * * facsimiles, or drawings thereof, with said secretary and by filing therewith a sworn statement, specifying the name of the person, firm, copartnership, corporation, association, or union of workmen, on whose behalf such label, trade-mark, term, trade-name, pattern, model, design, device, shop-mark, drawing, specification, designation, or form of advertisement is to be filed, the class of merchandise and a separate description of the goods to which the same has been or is intended to be appropriated, the residence, location, or place of business of such party, that the party, on whose behalf such label, trade-mark, trade-name, term, design, pattern, model, device, shop-mark, drawing, specification, designation, or form of advertisement is to be filed, has the right to the use of the same, and that no other person, or persons, firm, copartnership, corporation, association, or union of workmen * * * has such right either in the identical form or in any such near resemblance thereto as may be calculated to deceive, and that the originals, copies, photographs, or cuts, counterparts * * * facsimiles, or drawings filed therewith are correct. * * *

2. Where the several parts of a single unit article of trade or commerce are severally marked to distinguish them by the person, firm, copartnership, corporation, association, or union of workmen having the right to manufacture such single unit under a trade-name or brand used by him or them, such person, firm, copartnership, corporation, association, or union may, in filing under this section the designation of such trade-name or brand, attach thereto photographs or cuts with specifications of the several parts of the unit to which it is attached or applied, and thereafter no further filing or registration of any

such parts so used shall be necessary to protect the owner or lawful use of the trade-name or brand of the unit against the use by others of any of the several parts thereof, and any such filing shall be construed to be a single filing, and but one filing fee shall be paid therefor. * * * (Amended May 13, 1909. Laws 1909, ch. 127, p. 688.)

in Wyoming, § 2526. Any person, association or union may adopt a label, trade-mark, stamp or form of advertisement not previously owned or adopted by any other person, association or union, and may file the same for record in the office of the secretary of state, by leaving two copies, counterparts or facsimiles thereof, with said secretary; and shall file therewith a certificate specifying the name or names of the person, association or union so filing such label, trade-mark, stamp or form of advertisement, his or its residence, location or place of business, the class of merchandise and the particular description of goods comprised in such class to which it has been or is intended to be appropriated, and the length of time, if any, during which it has been in use. Such certificate shall be accompanied by a written declaration, verified under oath by the person or some officer of the association or union by whom it is filed, to the effect that the party so filing such label, trade-mark, stamp or form of advertisement, has a right to the use of the same, and that no other person, firm, association, union or corporation has the right to such use, either in the identical form or in any such near resemblance thereto as may be calculated to deceive and that the facsimiles, copies or counterparts filed therewith are true and correct. There shall be paid for such filing the fee of five dollars. Said secretary shall deliver to such person, association or union so filing the same, a duly attested certificate of the record of the same, for which he shall receive the fee of five dollars. Such certificate of record shall, in all suits and prosecutions under this chapter, be sufficient proof of the adoption of such label, stamp, trade-mark or form of advertisement. No label, trade-mark, stamp or form of advertisement shall be recorded that would reasonably be mistaken for a label, trade-mark, stamp or form of advertisement already on record.

Right to good-will of business.

California, § 992. The good-will of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 4566. North Dakota, Rev. Codes 1905, § 4922. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 4176; Comp. Laws 1909 (Snyder), § 7362. South Dakota, Rev. Codes 1903, C. C. § 893.

§ 411. COMPLAINT [OR PETITION].

FORM No. 983—To restrain infringement of trade-mark and for damages.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That the plaintiff is, and ever since the day of , 19 , continuously has been, the manufacturer and vendor of an article of trade known as , which he has for years last past offered for sale and sold to dealers and merchants generally in packages [or bottles], labeled with his own proper device and trade-mark, adopted by plaintiff for that purpose in the year 19 ; that the following is a copy of said label and trade-mark: [Here insert copy.]

2. That by reason of the long experience and great care of plaintiff in his said business and in the preparation of said article, and the good quality of the same, said article became widely known to the trade and in the communities generally where sold as a valuable and useful article, and acquired a high reputation as such, and has commanded an extensive sale at and elsewhere; that the sale of said article aforesaid has been a source of great profit to plaintiff.

3. That on the day of , 19 , and while the defendant knew of plaintiff's right to said trade-mark, and ever since thereafter, the defendant, without leave or consent of the plaintiff, caused a similar and inferior article to be put up in similar packages [or bottles] and labeled with a similar label; that said similar label is an imitation of plaintiff's said label; that the following is a copy of said label used by defendant: [Here insert copy]; that said inferior article was offered for sale, and sold so labeled with said similar label; that said inferior article so labeled and offered for sale and sold by defendant is calculated to deceive and mislead the purchasers

and consumers of plaintiff's said article, and actually has deceived and continues to deceive and mislead many, and causes them to buy the said inferior article sold by defendant; that thereby the general reputation of said article prepared and sold by plaintiff has been injured; that all of the acts of the defendant have been to the great detriment and diminution of the business and profits of the plaintiff, and that by reason thereof the plaintiff has been greatly injured, to his damage in the sum of \$.

Wherefore, plaintiff prays judgment against defendant: That he and his agents and servants be forever enjoined and restrained from preparing and from selling said imitation article, labeled with such imitation labels of plaintiff's said label; and that defendant account for and pay over to the plaintiff all profits realized by defendant upon sales of said imitation article in packages [or bottles] labeled with such imitation labels; and for \$, damages; and for costs and such other relief as to the court may seem proper.

A. B., Attorney for plaintiff.

[Verification.]

For form of complaint held sufficient, see *Ford v. Ames*, 36 Hun. 571.

§ 412. ANNOTATIONS.

State legislation as to trade-marks.—The act which confers upon the courts of the United States, in general terms, jurisdiction over suits for infringement of a trade-mark does not assume to take away or impair the jurisdiction which the courts of the several states always had over such suits: *In re Keasbey v. Mattison Co.*, 160 U. S. 221, 229.

Assignee's right protected by injunction.—The right to the use of a trade-name may be transferred to another, and the right so transferred will be protected from infringement by injunction: *Spleker v. Lash*, 102 Cal. 38, 36 Pac. 362.

Injunction may issue to restrain the use of one's own name, where such use is made with such additions as to intentionally deceive the public and make them believe he is selling the goods of another: *McLean v. Fleming*, 96 U. S. 251; *Brown Chemical Co. v. Meyer*, 139 U. S. 542; *California Fig Syrup Co. v. Improved Fig Syrup Co.*, 51 Fed. Rep. 297; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 54 Fed. Rep. 178.

Labor unions.—Right to trade-names.—For the substance of a complaint in an action by a labor union, brought through its officers and members, to enjoin the fraudulent use of a trade-mark, held sufficient (the order overruling a demurrer thereto affirmed on appeal by an equally divided court), see *Allen v. McCarthy*, 37 Minn. 349. But see, as to right to use a distinctive symbol not proprietary within the meaning of the trade-mark acts: *Cigarmakers Protective Union v. Conhalm*, 40 Minn. 243, 247.

Requisites of complaint.—In order to warrant an injunction the bill must allege: (1) Existence of trade-mark, (2) the fact of imitation, either actual or colorable; and (3) the fact that such imitation is made without license or acquiescence of the complainant: *Gaines & Co. v. Sroufe*, 117 Fed. (C. C.) 965.

Counterclaim.—The rights of a defendant to the good-will of a business and a trade-name may be asserted by way of counterclaim in an action in which the

plaintiff sues to enjoin the use of such name. It is held that such claim on the part of the defendant is inseparable from the subject-matter of such controversy, and therefore within the scope of a statute allowing a counterclaim for a cause of action connected with the subject of the action: *The G. & H. Mfg. Co. v. Hall*, 61 N. Y. 226, 236.

CHAPTER CXX.

Actions under Civil Damage Acts.

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§ 413. COMPLAINT [OR PETITION].

FORM No. 984—For civil damages for selling intoxicating liquor to a minor son.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That he is the father of C. B., a minor, of the age of years; that said C. B. resided with the plaintiff on his farm in County, in this state, and assisted plaintiff in carrying on the work of said farm, and was a means of support to plaintiff until the date hereinafter mentioned.

2. That the defendant Y. Z. is, and during the times herein mentioned continuously has been, the owner of a certain lot and building in the village of , county of , in this state, which building is kept as a hotel by the said Y. Z., known as the Hotel.

3. That prior to the month of , 19 , defendant Y. Z. leased to the defendant W. X. a room in the basement of said building for a barroom, with knowledge that intoxicating liquors were to be sold therein, and during the month of , 19 , defendant W. X. kept a bar in said room at which he sold intoxicating liquors, all of which was done with the knowledge and consent of defendant Y. Z.

4. That on or about [giving date] the said C. B. became and was intoxicated at the village of aforesaid; that such intoxication was caused in whole or in part by intoxicating liquors sold or given away at said bar by defendant W. X., his agents or servants.

5. That in consequence of said intoxication the said C. B. was so injured that he has ever since been sick, and for the greater part of

the time confined to his bed and delirious, and plaintiff has been put to great expense for medical attendance, nursing, and medicines for his said minor son, and has been wholly deprived of his labor and services, and has been thereby injured in his property and means of support, and has sustained damages in the sum of \$.

[Concluding part.]

Form of petition in an action to recover for loss of support of the husband and father caused by intoxication from liquors furnished, in part at least, by the defendant: *Roberts v. Taylor*, 19 Neb. 184, 185, 27 N. W. 87, 88.

Form of complaint in an action for damages for injury caused by sale of intoxicating liquors: *Buckmaster v. McElroy*, 20 Neb. 557, 31 N. W. 76, 57 Am. Rep. 843.

Right of action under civil damage laws.—Where the statute provides for a right of action against a person making unlawful sales of intoxicating liquors, and the bond of such person mentioned in the act, such right of action is exclusive, and no action can be maintained under such statute except by the persons named therein, and except as expressly provided in the statute: *Kennedy v. Garrigan* (S. Dak.), 121 N. W. 783, 785, citing and construing Laws 1897, p. 211, ch. 72, § 13.

§ 414. ANNOTATIONS.—Civil damage acts.

1. Nature of acts.—Constitutionality.
- 2-5. Parties to action.
6. Averment as to kind of liquor sold unnecessary.
- 7, 8. Damages.—Compensatory and exemplary.
9. Contributory negligence.

1. Nature of acts.—Constitutionality.—The civil damage acts are purely statutory: *Farrell v. Drees*, 41 Wis. 186; and such acts are generally held to be constitutional: *Franklin v. Schermerhorn*, 8 Hun 112; *Bertholf v. O'Reilly*, 74 N. Y. 509, 30 Am. Rep. 323; *State v. Ludington*, 33 Wis. 107.

2. Parties to action.—A poor person dependent for support upon a relative under the provisions of the statute may maintain action in his own name and for his own benefit, where he has been deprived of such support through the acts of a vendor of intoxicating liquors, and this independently of action by the county commissioners for the offense: *Fitzgerald v. Donohoe*, 48 Neb. 852, 67 N. W. 880.

3. The wife may sue in her own right, or she may join the children with her: *Wardell v. McConnell*, 23 Neb. 152, 36 N. W. 278; or the widow may sue: *Fink v. Garman*, 40 Pa. (4 Wright) 95; or any minor child injured, within the contemplation of the acts: *Bloedel v. Zimmerman*, 41 Neb. 695, 60 N. W. 6, (in which case the sureties on the bond of the liquor-seller were held to be properly joined as defendants); or a father

where he is wholly dependent upon his son may sue: *Stevens v. Cheney*, 36 Hun 1; or the mother: *Clinton v. Lansing*, 61 Mich. 355, 28 N. W. 125, (where the son was an adult); or the parent of a minor: *McNeill v. Collinson*, 130 Mass. 167; or, generally, any person injured as a result of the intoxication, the statute so reading: *Flower v. Witkovsky*, 69 Mich. 371, 37 N. W. 364.

4. The intoxicated person himself may under certain statutes recover against the saloon-keeper: *Buckmaster v. McElroy*, 20 Neb. 557, 31 N. W. 76, 57 Am. Dec. 843.

5. A physician who rendered professional services to an intoxicated person, held not entitled to sue for such services under a statute providing that one shall be liable for and compelled to pay a reasonable compensation "to any person who may take charge of and provide for such intoxicated person," etc.: *Samson v. Greenough*, 55 Iowa 127, 7 N. W. 482.

6. Averment as to kind of liquor sold unnecessary.—The complaint is not required to allege the kinds of liquor sold: *Edwards v. Brown*, 67 Mo. 377; nor necessarily the particular place of sale:

Gustafson v. Wind, 62 Iowa 281, 17 N. W. 523.

7. **Damages.**—As to measure of compensatory damages under civil damage acts, see *Goodenough v. McGrew*, 44 Iowa 670, *Huggins v. Kavanagh*, 52 Iowa 868, 3 N. W. 409; *Sellars v. Foster*, 27 Neb. 118, 42 N. W. 907; *Freese v. Tripp*, 70 Ill. 496; *Brantigan v. While*, 73 Ill. 561; *Kearney v. Fitzgerald*, 43 Iowa 580.

8. As to exemplary damages, when and when not allowed: *Meldel v. Anthis*, 71 Ill. 241; *Brannon v. Silvernail*, 81 Ill. 434; *Goodenough v. McGrew*, 44 Iowa 670; *Flint v. Gauer*, 66 Iowa 696;

Roose v. Perkins, 9 Neb. 304, 2 N. W. 715, 31 Am. Dec. 409; *Neu v. McKechnie*, 95 N. Y. 632, 47 Am. Rep. 89.

9. **Contributory negligence** to defeat the action must be that of the plaintiff: *Davies v. McKnight*, 146 Pa. 610, 23 Atl. 320, (where the deceased was held not guilty of contributory negligence); *Engelken v. Hilger*, 43 Iowa 563, (where wife's acts contributed to her husband's intoxication); *Ward v. Thompson*, 48 Iowa 588, (where the acts of the wife in purchasing liquor for her husband was held not contributory, inasmuch as she acted under compulsion).

TITLE XV.

Provisional Remedies in Civil Actions.

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CHAPTER CXXI.

Arrest and Bail.

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§ 415. CODE PROVISIONS.

Grounds of arrest in civil cases.

California, § 479. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon contract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors.
2. In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent, or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a wilful violation of duty.
3. In an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed, or disposed of, to prevent its being found or taken by the sheriff.

4. When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought.

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Alaska, Ann. Codes 1907, C. C. P. (Carter), § 99. b Arkansas, Dig. of Stats. 1904 (Kirby), § 300. c Idaho, Rev. Codes 1909, § 4241. d Kansas, Gen. Stats. 1905 (Dassler), § 5030. e Montana, Rev. Codes 1907, § 6596. f Nebraska, Comp. Stats. Ann. 1909, § 7124; Ann. Stats. 1909 (Cobbey), § 1556. g Nevada, Comp. Laws Ann. 1900 (Cutting), § 3168. h North Dakota, Rev. Codes 1905, § 6890. i Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 260. j South Dakota, Rev. Codes 1903, C. C. P. § 157. k Utah, Comp. Laws 1907, § 3010. l Washington, Code 1910 (Rem. & Bal.), § 749. m Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2689. n Wyoming, Rev. Stats. 1899, § 3959.

* Alaska, C. C. P. § 99. No person shall be arrested in any civil action at law except as provided in this section. The defendant may be arrested in the following cases:

First. In an action for the recovery of money or damages when the defendant is about to remove from the district with intent to defraud his creditors, or when the action is for any injury to person, or for wilfully injuring or wrongfully taking, detaining, or converting property.

Second. In an action for a fine or penalty, or for money, or for property embezzled or fraudulently misapplied or converted to his own use by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment.

Third. In an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed, or disposed of, so that it can not be found or taken by the marshal, and with intent that it should not be so found or taken, or with intent to deprive the plaintiff of the benefit thereof.

Fourth. When the defendant has been guilty of a fraud in contracting a debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property for the taking, detention, or conversion of which the action is brought.

Fifth. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors.

But no female shall be arrested in any action except for injury to person, character, or property.

b Arkansas, § 300. An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought at its commencement or at any time before judgment, when there is filed in his office an affidavit of the plaintiff, showing in all cases of arrest on civil process:

First. The nature of the plaintiff's claim or debt, and charging the defendant with fraud in contracting the same.

Second. That it is just.

Third. The amount or value which the affiant believes the plaintiff ought to recover.

Fourth. That the affiant believes either that the defendant is about to depart from this state, and, with the intent to defraud his creditors, has con-

concealed or removed from this state his property, or so much thereof that the process of the court, after judgment, can not be executed, or that the defendant has money or securities for money, or evidence of debt, in the possession of himself, or of others for his use, and is about to depart from this state without leaving property therein sufficient to satisfy the plaintiff's claim.

Idaho, § 4241. The defendant may be arrested as hereinafter prescribed, in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising upon a contract express or implied where the defendant is about to depart from the state with intent to defraud his creditors, or when the action is for wilful injury to person, to character, or to property, knowing the property to belong to another;

2. In an action for a fine or penalty, or on a promise to marry, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such or by any other person in a fiduciary capacity; or for misconduct or neglect in office or in a professional employment or for a wilful violation of duty; (Remainder same as Cal. C. C. P. § 479.)

Kansas, § 5030. An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, stating the nature of the plaintiff's claim, that it is just, and the amount thereof, as nearly as may be, and showing one or more of the following particulars:

First. That the defendant has removed or begun to remove any of his property out of the jurisdiction of the court, with intent to defraud his creditors.

Second. That he has begun to convert his property or a part thereof into money, for the purpose of placing it beyond the reach of his creditors.

Third. That he has property or rights of action which he fraudulently conceals.

Fourth. That he has assigned, removed or disposed of, or has begun to dispose of his property or a part thereof, with intent to defraud his creditors.

Fifth. That he fraudulently contracted the debt or incurred the obligation for which suit is about to be or has been brought. The affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of the above particulars. (Re-enacted Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 148.)

Montana, § 6596, first sub. same as first sub. of Idaho § 4241, remainder same as subs. 2 to 5 inclusive of Cal. C. C. P. § 479.

Nebraska. There is now no provisions for the arrest of a defendant in a civil action on mesne process; but § 7124 provides for the issuance of an execution against the person of the debtor upon a money judgment in certain cases.

Nevada, § 3168, substantially same as Cal. C. C. P. § 479, except at the end of first sub. add "or when the action is for libel or slander." Also in the last clause of sub. three change the words "to prevent its being" to read "so that it cannot be" before the word "found."

North Dakota, § 6890. The defendant may be arrested as hereinafter prescribed in the following cases:

1. In an action for the recovery of damages for any injury to person or character, or for injuring or for wrongfully taking, detaining or converting property.

2. In an action for money or property embezzled or fraudulently misapplied or converted to his own use by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or other person in a fiduciary capacity, in the course of his employment as such.

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed or disposed of, so that he [it] cannot be found or taken by the sheriff and with the intent that it should not be found or taken, or with intent to deprive the plaintiff of the benefit thereof.

4. When the defendant has been guilty of a fraud in contracting the debt, or in incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention or conversion of which the action is brought, or when the action is brought to recover damages for fraud or deceit.

5. When the defendant has removed or disposed of his property or is about to do so with the intent to defraud his creditors.

But no female shall be arrested in any action except for wilful injury to person, character or property.

! Oregon, § 260. No person shall be arrested in an action at law, except as provided in this section. The defendant may be arrested in the following cases:

1. In an action for the recovery of money or damages on a cause of action arising out of contract, when the defendant is not a resident of the state, or is about to remove therefrom, or when the action is for an injury to person or character, or for injuring or wrongfully taking, detaining, or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

Subs. 3, 4, 5 and final paragraph, same as Alaska C. C. P. § 99.

! South Dakota, C. C. P. § 157. The defendant may be arrested, as hereinafter prescribed, in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining or converting property.

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or for property embezzled or fraudulently misapplied, by a public officer, or by an attorney, solicitor, or counselor, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office, or in a professional employment.

[Remainder same as North Dakota § 6890, from and including sub. 3 to the

end.] (Re-enacted Feb. 26, 1907, *Session Laws 1907*, pp. 165, 178.)

k Utah, § 3010. No person shall be arrested in a civil action except an absconding debtor.

l Washington, § 749. The defendant may be arrested in the following cases:

1. In an action for the recovery of damages, on a cause of action not arising out of contract, where the defendant is a non-resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for injuring, or for wrongfully taking, detaining, or converting property;

2. In an action for a fine or penalty, or on a promise to marry, or for money received, or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or by an attorney, or by an officer or agent of a corporation in the course of his employment as such, or by any factor, agent, broker, or other person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment;

3. In an action to recover the possession of personal property unjustly detained, when the property, or any part thereof, has been concealed, removed, or disposed of, so that it cannot be found or taken by the sheriff, and with intent that it should not be so found or taken, or with the intent to deprive the plaintiff of the benefit thereof;

4. When the defendant has been guilty of a fraud in contracting the debt, or incurring the obligation for which the action is brought, or in concealing or disposing of the property, for the taking, detention, or conversion of which the action is brought;

5. When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors;

6. When the action is to prevent threatened injury to or destruction of property, in which the party bringing the action has some right, interest, or title, which will be impaired or destroyed by such injury or destruction, and the danger is imminent that such property will be destroyed or its value impaired, to the injury of the plaintiff;

7. On the final judgment or order of any court in this state, while the same remains in force, when the defendant, having no property subject to execution,

or not sufficient to satisfy such judgment, has money which he ought to apply in payment upon such judgment, which he refuses to apply, with intent to defraud the plaintiff, or when he refuses to comply with a legal order of the court, with intent to defraud the plaintiff; or when any one or more of the causes exist for which an arrest is allowed in the first class of cases mentioned in this section.

Wisconsin, § 2689. The defendant may be arrested as hereinafter prescribed in the following cases:

1. In an action for the recovery of damages on a cause of action not arising out of contract, where the defendant is not a resident of the state, or is about to remove therefrom, or where the action is for an injury to person or character, or for seduction, or for criminal conversation, or for injuring, or for wrongfully taking, detaining or converting property, and in actions to recover damages for the value of property obtained by the defendant under false pretenses or false tokens.

2. In an action for fine or penalty, or for money received, or for property embezzled or fraudulently misapplied by a public officer or by an attorney, solicitor or counsel, or by an officer or agent of a corporation or banking association, in the course of his employment as such, or by any factor, agent, broker or any person in a fiduciary capacity, or for any misconduct or neglect in office or in a professional employment.

3. In an action to recover possession of personal property unjustly detained where the property or any part thereof has been concealed, removed or disposed

of so that it cannot be found or taken by the sheriff.

But no female shall be arrested in any action except for a wilful injury to person, character or property.

Wyoming, § 3959. An order for the arrest of the defendant shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his authorized agent or attorney, made before a judge or clerk of any court of the state, or a justice of the peace, stating the nature of the plaintiff's claim, that it is just, and the amount thereof, as nearly as may be, and establishing one or more of the following particulars:

1. That the defendant has removed, or begun to remove, any of his property out of the jurisdiction of the court with intent to defraud his creditors.

2. That he has begun to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors.

3. That he has property, or rights of action, which he fraudulently conceals.

4. That he has assigned, removed, disposed of, or begun to dispose of, his property, or a part thereof, with intent to defraud his creditors.

5. That he fraudulently contracted the debt, or incurred the obligation, for which suit is about to be or has been brought.

6. That the money, or other valuable thing, for which a recovery is sought in the action, was lost by playing any game, or by means of a bet or wager.

The affidavit shall also contain a statement of the facts claimed to justify the belief in the existence of one or more of such particulars.

Proceedings against bail in civil arrest.

California, § 490. If the bail neglect or refuse to pay the judgment within ten days after they are finally charged, an action may be commenced against such bail for the amount of the original judgment. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Alaska, Ann. Codes 1907, C. C. P. (Carter), § 105. **Arkansas, Dig. of Stats. 1904 (Kirby), § 327.** **Idaho, Rev. Codes 1909, § 4252.** **Kansas, Gen. Stats. 1905 (Dassler), § 5049.** **Montana, Rev. Codes 1907, § 6607.** **Nevada,**

Comp. Laws Ann. 1900 (Cutting), § 3179. ^d North Dakota, Rev. Codes 1905, § 6901. ^e Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 266. ^f South Dakota, Rev. Codes 1903, C. C. P. § 168. Utah, Comp. Laws 1907, § 3021. ^g Washington, Code 1910 (Rem. & Bal.), § 761. ^h Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2710. ⁱ Wyoming, Rev. Stats. 1899, § 3978.

^a Alaska, C. C. P. § 105. In case of the failure to comply with the undertaking, the bail may be proceeded against by action only.

^b Arkansas, § 327. The bail can be proceeded against in a separate action only.

^c Kansas, § 5049. The liability of the bail shall be fixed in the manner provided in section 165, for fixing the liability of the sheriff as bail, and the bail can be proceeded against in an action only. (Re-enacted Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 167.)

^d North Dakota, § 6901, same as Alaska C. C. P. § 105.

^e Oregon, § 266, same as Alaska, C. C. P. § 105.

^f South Dakota, C. C. P. § 168, same as Alaska C. C. P. § 105. (Re-enacted Feb. 26, 1907, Sess. Laws 1907, pp. 165, 180.)

^g Washington, § 761, substantially same as Alaska C. C. P. § 105.

^h Wisconsin, § 2710, substantially same as Alaska C. C. P. § 105.

ⁱ Wyoming, § 3978, substantially same as Kansas § 5049.

§ 416. REFERENCES TO FORMS.

Affidavit to obtain order of arrest, ch. XXIII, form No. 217.

Undertaking and security by plaintiff before order of arrest is made, ch. XXIII, form No. 218.

Justification of sureties on undertaking, ch. XXIII, form No. 218.

Order for arrest, ch. XXIII, form No. 219.

Sheriff's return to order of arrest, ch. XXIII, form No. 220.

For defense of justification of arrest under civil process in action for false imprisonment, see ch. XXIII, form No. 210, and exhibits thereto, forms Nos. 211-220.

For actions upon bonds and undertakings, see ch. C, forms 822-833.

§ 417. ANNOTATIONS.

Constitutionality of provisions.—Provisions of the statute providing for arrest in civil cases are not violative of the constitution: *University of California v. Bernard*, 57 Cal. 212; *Dusy v. Helm*, 59 Cal. 188, 191.

Right governed by law of place of action.—The right to arrest a defendant in a civil action is a part of the remedy afforded the plaintiff, and the right exists according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act: *Ex parte Howitz*, 2 Cal. App. 752, 753, 84 Pac. 229.

Issue of fraud essential.—No judgment of imprisonment can be rendered in proceedings for civil arrest, unless the issue of fraud is presented by the pleadings: *Mattoon v. Eder*, 6 Cal. 57, 58, (upon bail bond given by the defendant who had been arrested on mesne process in an action for debt where no fraud was alleged in the complaint); *Davis v. Robinson*, 10 Cal. 411, 412, (for civil arrest on order issued where the affidavit alone charged fraud).

It has ever been held that the complaint must charge fraud before mesne process for arrest may be issued: *Ex parte Howitz*, 2 Cal. App. 752, 757, 84 Pac. 229, (proceeding for civil arrest—affidavit referring to and adopting averments in the complaint).

Complaint as alder of affidavit.—Where a copy of a complaint is annexed to the affidavit, and the affiant makes oath that the allegations contained therein are true,

this is held to be in sufficient compliance with the requirements of the law that it must appear from the affidavit that the cause exists: *Ex parte Howitz*, 2 Cal. App. 752, 756, 84 Pac. 229, (proceedings for civil arrest.)

CHAPTER CXXII.

Claim and Delivery of Personal Property.—Replevin.

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§ 418. CODE PROVISIONS.

Claim and delivery—Time of making claim.

California, § 509. The plaintiff in an action to recover the possession of personal property may, at the time of issuing the summons, or at any time before answer, claim the delivery of such property to him as provided in this chapter. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Alaska**, Ann. Codes 1907, C. C. P. (Carter), § 123. • **Arizona**, Rev. Stats. 1901, ¶ 3812. • **Arkansas**, Dig. of Stats. 1904 (Kirby), § 6853. • **Colorado**, Rev. Stats. 1908, C. C. P. § 85. • **Hawaii**, Rev. Laws 1905, § 2101. **Idaho**, Rev. Codes 1909, § 4271. • **Iowa**, Ann. Code 1897, § 4163. • **Kansas**, Gen. Stats. 1905 (Dassler), § 5058. • **Minnesota**, Rev. Laws 1905, § 4204. • **Missouri**, Ann. Stats. 1906, § 4463. **Montana**, Rev. Codes 1907, § 6622. • **Nebraska**, Comp. Stats. Ann. 1909, § 6723; Ann. Stats. 1909 (Cobbey), § 1152. **Nevada**, Comp. Laws Ann. 1900 (Cutting), § 3194. • **New Mexico**, Comp. Laws 1897, § 2685, sub-sec. 228. • **North Dakota**, Rev. Codes 1905, § 6917. • **Oklahoma**, Rev. and Ann. Stats. 1903 (Wilson), § 4351; Comp. Laws 1909 (Snyder), § 5687. • **Oregon**, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 284. • **South Dakota**, Rev. Codes 1903, C. C. P. § 184. • **Texas**, Civ. Stats. 1897 (Sayles), Art. 4864. **Utah**, Comp. Laws 1907, § 3045. • **Washington**, Code 1910 (Rem. & Bal.), § 707. • **Wisconsin**, Stats. 1898 (San. & Ber. Ann.), § 2717. • **Wyoming**, Rev. Stats. 1899, § 4145.

• **Alaska**, C. C. P. § 123. In an action to recover possession of personal property, the plaintiff, at any time after the action is commenced, and before judgment, may claim the immediate delivery of such property, as provided in this chapter.

• **Arizona**, ¶ 3812. If the plaintiff claim in his complaint the possession of specific personal property, he may at the time of filing his complaint or at any other time afterwards, before the rendi-

tion of judgment in the cause, file his affidavit, or the affidavit of some other person in his behalf, showing:

1. That the plaintiff is the owner of the property claimed, sufficiently describing it, or is lawfully entitled to the possession thereof.

2. That it is wrongfully detained by the defendant.

3. The actual value thereof.

4. That the same has not been seized under any process, execution or attach-

ment against the property of the plaintiff, or, if so seized, that it is by statute exempt from such seizure. (Amended Mch. 19, 1903, Laws 1903, pp. 157, 160.)

• Arkansas, § 6853, substantially same as Alaska C. C. P. § 123, except insert "specific" before "personal property."

• Colorado, C. C. P. § 85. The plaintiff in an action to recover possession of personal property, may at the time of filing the complaint, or issuing the summons, or at any time before judgment, claim the delivery of such property to him, as provided in this chapter.

• Hawaii, § 2101, same as Cal. C. C. P. § 509, except in third clause after the word "before" change "answer" to "issue being joined in such action."

• Iowa, § 4163. An action of replevin may be brought in any county in which the property or some part thereof is situated. The petition must be verified and must state:

1. A particular description of the property claimed;

2. Its actual value, and, where there are several articles, the actual value of each;

3. The facts constituting the plaintiff's right to the present possession thereof, and the extent of his interest in the property, whether it be full or qualified ownership;

4. That it was neither taken on the order or judgment of a court against him, nor under an execution or attachment against him or against the property; but if it was taken by either of these modes, then it must state the facts constituting an exemption from seizure by such process;

5. The facts constituting the alleged cause of detention thereof, according to his best belief;

6. The amount of damages which the affiant believes the plaintiff ought to recover for the detention thereof.

• Kansas, § 5058. The plaintiff, in an action to recover the possession of specific personal property, may, at the commencement of the suit, or at any time before answer-day, claim the immediate delivery of such property, as provided in this chapter. (Amended, Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 176.)

• Minnesota, § 4204, substantially same as Cal. C. C. P. § 509, except insert "immediate" before "delivery" in last clause.

• Missouri, § 4463. If the plaintiff claim in his petition the possession of specific personal property, he may, at the time of

filing his petition, or at any other time afterwards, before the rendition of judgment in the cause, file his affidavit, or the affidavit of some other person in his behalf, showing: First, that the plaintiff is the owner of the property claimed (sufficiently describing it), or is lawfully entitled to the possession thereof; second, that it is wrongfully detained by the defendant; third, the actual value thereof; fourth, that the same has not been seized under any process, execution or attachment against the property of the plaintiff; and, fifth, that plaintiff will be in danger of losing his said property, unless it be taken out of the possession of the defendant or otherwise secured.

• Nebraska, § 6723, substantially same as Kansas § 5058.

• New Mexico, § 2685, sub-sec. 228. Any person having a right to the immediate possession of any goods or chattels, wrongfully taken or wrongfully detained, may bring an action of replevin for the recovery thereof and for damages sustained by reason of the unjust caption or detention thereof. (Laws 1907, p. 280.)

• North Dakota, § 6917, same as Minnesota § 4204.

• Oklahoma, § 4351, substantially same as Kansas § 5058.

• Oregon, § 284, same as Alaska C. C. P. § 123.

• South Dakota, C. C. P. § 184, substantially same as Minnesota § 4204. (Re-enacted Feb. 26, 1907, Sess. Laws 1907, pp. 165, 183.)

• Texas, Art. 4864. Judges and clerks of the district and county courts, and justices of the peace, shall, at the commencement or during the progress of any civil suit, before final judgment, have power to issue writs of sequestration, returnable to their respective courts, in the following cases:

1. When a married woman sues for divorce, and makes oath that she fears her husband will waste her separate property, or their common property, or the fruits or revenue produced by either, or that he will sell or otherwise dispose of the same so as to defraud her of her just rights, or remove the same out of the limits of the county during the pendency of the suit.

2. When a person sues for the title or possession of any personal property of any description, and makes oath that he fears the defendant or person in possession thereof will injure, ill-treat, waste or destroy such property, or remove the

same out of the limits of the county during the pendency of the suit.

3. When a person sues for the foreclosure of a mortgage or the enforcement of a lien upon personal property of any description, and makes oath that he fears the defendant or person in possession thereof will injure, ill-treat, waste or destroy such property, or remove the same out of the county during the pendency of the suit.

4. When any person sues for the title or possession of real property, and makes oath that he fears the defendant or person in possession thereof will make use of his possession to injure such property, or waste or convert to his own use the fruits or revenue produced by the same.

5. When any person sues for the title or possession of any property from which he has been ejected by force or violence, and makes oath of such fact.

6. When any person sues for the foreclosure of a mortgage or the enforcement

of a lien on real estate, and makes oath that he fears the defendant or person in possession thereof will make use of such possession to injure such property, or waste or convert to his own use the timber, rents, fruits or revenue thereof.

7. When any person sues to try the title to any real property, or to remove cloud upon the title to any such real property, or to foreclose a lien upon any such real property, or for a partition of real property, and makes oath that the defendant, or either of them in the event there be more than one defendant, is a non-resident of this state.

q Washington, § 707, substantially same as Minnesota § 4204.

r Wisconsin, § 2717, substantially same as Minnesota § 4204.

s Wyoming, § 4145. The possession of specific personal property may be recovered in an action as provided in this chapter.

Affidavit in claim and delivery.

California, § 510. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one in his behalf, showing:

1. That the plaintiff is the owner of the property claimed (particularly describing it), or is entitled to the possession thereof;

2. That the property is wrongfully detained by the defendant;

3. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

4. That it has not been taken for a tax, assessment, or fine, pursuant to a statute; or seized, under an execution or an attachment against the property of the plaintiff; or, if so seized, that it is by statute exempt from such seizure;

5. The actual value of the property. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Alaska, Ann. Codes 1907, C. C. P. (Carter), § 124. b Arizona, Rev. Stats. 1901, § 3812. c Arkansas, Dig. of Stats. 1904 (Kirby), § 6854. d Colorado, Rev. Stats. 1908, C. C. P. § 86. e Hawaii, Rev. Laws 1905, § 2102. f Idaho, Rev. Codes 1909, § 4272. g Iowa, Ann. Code 1897, § 4163. h Kansas, Gen. Stats. 1905 (Dassler), § 5059. i Minnesota, Rev. Laws 1905, § 4205. j Missouri, Ann. Stats. 1906, § 4463. k Montana, Rev. Codes 1907, § 6623. l Nebraska, Comp. Stats. Ann. 1909, § 6724; Ann. Stats. 1909 (Cobbey), § 1153. m Nevada, Comp. Laws Ann. 1900 (Cutting), § 3195. n New Mexico, Comp. Laws 1897, § 2685.

1. 232. ^a North Dakota, Rev. Codes 1905, § 6918. ^o Oklahoma, Rev. and Stats. 1903 (Wilson), § 4352; Comp. Laws 1909 (Snyder), § 5688. ^m ⁿ, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 285. ^c South Dakota, Codes 1903, C. C. P. § 185. ^r Texas, Civ. Stats. 1897 (Sayles), Art. 4865. Comp. Laws 1907, § 3046. ^t Washington, Code 1910 (Rem. & Bal.), ^u Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2718. ^v Wyoming, Rev. 1899, § 4146.

aska, C. C. P. § 124, same as Cal. C. § 510, except at the end of sub. 1 "by virtue of a special property in, the facts in respect to which be set forth."

Arizona, § 3812, see note b to Cal. C. C. P. § 509.

^c Arkansas, § 6854. An order for the delivery of property to the plaintiff shall be made by the clerk when there is filed in his office an affidavit of the plaintiff, or of some one in his behalf, showing:

First. A particular description of the property claimed.

Second. Its actual value, and the damages which the affiant believes the plaintiff ought to recover for the detention thereof.

Third. That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property.

Fourth. That the property is wrongfully detained by the defendant, with the alleged cause of the detention thereof, according to the best knowledge, information and belief of the affiant.

Fifth. That it has not been taken for a tax or fine against the plaintiff, or under any order or judgment of a court against him, or seized under an execution or attachment against his property, or, if so seized, that it is by statute exempt from such seizure.

Sixth. That the plaintiff's cause of action has accrued within three years; and where the action is brought to recover property taken under an execution, the affidavit must state the fact of the taking, and the nature of the process under which it was done.

^d Colorado, C. C. P. § 86, substantially same as Cal. C. C. P. § 510, except omit sub. 3 of Cal. statute and renumber subs. 4 and 5 to subs. 3 and 4 respectively, and at the end of the last subdivision of the Colorado statute add "which affidavit shall be filed with the clerk of the court."

^e Hawaii, § 2102, substantially same as Cal. C. C. P. § 510, except omit sub. 3 and renumber subs. 4 and 5 accordingly.

^f Idaho, § 4272, same as Cal. C. C. P. § 510, except at end of the opening passage change "showing" to "setting forth."

^g Iowa, § 4163, see note i to Cal. C. C. P. § 509.

^h Kansas, § 5059. An order for the delivery of property to the plaintiff shall be made by the clerk of the court in which the action is brought, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing:

First. A description of the property claimed.

Second. That the plaintiff is the owner of the property, or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the immediate possession of the property.

Third. That the property is wrongfully detained by the defendant.

Fourth. That it was not taken in execution on any order or judgment against said plaintiff, or for the payment of any tax, fine or amercement assessed against him, or by virtue of an order of delivery issued under this article, or any other mesne or final process issued against said plaintiff.

Fifth. If taken in execution, or on any order or judgment against the plaintiff, that it is exempt by law from being so taken.

Sixth. The actual value of the property. When several articles are claimed, the value of each shall be stated as nearly as practicable. (Amended, Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 177.)

ⁱ Minnesota, § 4205. An affidavit shall be made by the plaintiff or some person in his behalf, showing:

1. The particular property claimed, and that plaintiff is the owner thereof, or is lawfully entitled to its possession by virtue of a special property therein, the facts respecting which shall be set forth;

2. That the property is wrongfully detained by the defendant;

3. That the same was not taken for a tax, assessment, or fine, nor seized under an execution or attachment against plaintiff's property; or, if so seized, that it is by statute exempt from such seizure; and

4. The actual value of the property.

j Missouri, § 4463, see note i to Cal. C. C. P. § 509.

k Montana, § 6623, substantially same as Cal. C. C. P. § 510, except at end of opening passage change "showing" to "stating"; also omit sub. 3 of Cal. statute and renumber subs. 4 and 5 accordingly.

l Nebraska, § 6724. [Same as Kansas § 5059, to include sub. 4, omit rest of Kansas and add:]

"Provided, That such affidavit may omit the first and last clause of this subdivision and in lieu thereof, show that the property was taken in execution on a judgment or order, other than an order of delivery in replevin, and that the same is exempt from such execution or attachment under the laws of this state; and provided further, that the provisions of this act shall extend to and apply as well to proceedings in replevin had before justices of the peace."

m New Mexico, § 2685, sub-sec. 232. Before the writ of replevin shall be issued, the plaintiff, or some creditable person in his stead, shall file in the office of the clerk of the district court an affidavit alleging that the plaintiff is lawfully entitled to the possession of the property mentioned in the complaint, that the same was wrongfully taken, or wrongfully detained by the defendant, and that the right of action accrued within one year. Laws 1907, p. 281.

n North Dakota, § 6918, substantially same as Alaska C. C. P. § 124, except at end of opening passage change "showing" to "stating."

o Oklahoma, § 4352, same as Kansas § 5059.

p Oregon, § 285, same as Alaska C. C. P. § 124.

q South Dakota, C. C. P. § 185, same as North Dakota § 6918. (Re-enacted Feb. 26, 1907, Sess. Laws 1907, pp. 165, 183.)

r Texas, Art. 4865. No sequestration shall issue in any cause until the party applying therefor shall file an affidavit in writing stating—

1. That he is the owner of the property sued for or some interest therein, specifying such interest, and is entitled to the possession thereof; or,

2. If the suit be to foreclose a mortgage or enforce a lien upon the property, the fact of the existence of such mortgage or lien, and that the same is just and unsatisfied, and the amount of the same still unsatisfied, and the date when due.

3. The property to be sequestered shall be described with such certainty that it may be identified and distinguished from property of a like kind, giving the value of each article of the property and the county in which the same is situated.

4. It shall set forth one or more of the causes named in the preceding article entitling him to the writ.

s Utah, § 3046. Where a delivery is claimed, an affidavit must be made by the plaintiff, or by some one on his behalf, showing:

1. A description of the property claimed;

2. That the plaintiff is the owner of the property claimed or has a special ownership or interest therein, stating the facts in relation thereto, and that he is entitled to the possession thereof;

3. That the property is wrongfully detained by the defendant;

4. The alleged cause of the detention thereof, according to his best knowledge, information, and belief;

5. That it has not been taken for a tax, assessment, or fine, pursuant to a statute, or seized under an execution or an attachment against the property of the plaintiff; or if so seized, that it is by statute exempt from such seizure; and,

6. The actual value of the property.

t Washington, § 708, same as Alaska C. C. P. § 124, except omit sub. 3 and renumber 4 and 5 accordingly.

u Wisconsin, § 2718, same as Alaska C. C. P. § 124.

v Wyoming, § 4146. An order for the delivery of property to the plaintiff shall be issued by the clerk of the court in which the action is brought when there is filed in the office an affidavit of the plaintiff, his agent or attorney, showing:

1. A description of the property claimed.

2. That the plaintiff is the owner of the property, or has special interest therein, and if the ownership or interest is special or partial, the fact shall be stated.

3. That the property is wrongfully detained by the defendant.

4. That it was not taken upon any process issued against the plaintiff, or if taken under such process that the property was exempt from execution ex-

pressly or upon demand or selection by the plaintiff, and is not held for a tax, or if held for a tax, that it is not held for any tax legally assessed or levied against the plaintiff.

Judgment in replevin.

California, § 667. In an action to recover the possession of personal property, judgment for the plaintiff may be for the possession or the value thereof, in case a delivery cannot be had, and damages for the detention.

If the property has been delivered to the plaintiff, and the defendant claim a return thereof, judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

In an action on a contract or obligation in writing, for the direct payment of money, made payable in a specified kind of money or currency, judgment for the plaintiff, whether it be by default or after verdict, may follow the contract or obligation, and be made payable in the kind of money or currency specified therein; and in all actions for the recovery of money, if the plaintiff allege in his complaint that the same was understood and agreed by the respective parties to be payable in a specified kind of money or currency, and this fact is admitted by the default of the defendant or established by evidence, the judgment for the plaintiff must be made payable in the kind of money or currency so alleged in the complaint; and in an action against any person for the recovery of money received by such person in a fiduciary capacity, or to the use of another, judgment for the plaintiff must be made payable in the kind of money or currency so received by such person. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Alaska**, Ann. Codes 1907, C. C. P. (Carter), § 253. • **Arizona**, Rev. Stats. 1901, §§ 3821, 3823, 3824. • **Arkansas**, Dig. of Stats. 1904 (Kirby), § 6868. • **Colorado**, Rev. Stats. 1908, C. C. P. § 246. • **Idaho**, Rev. Codes 1909, § 4453. • **Iowa**, Ann. Code 1897, § 4176. • **Kansas**, Gen. Stats. 1905 (Dassler), § 5067. • **Minnesota**, Rev. Laws 1905, § 4267. • **Missouri**, Ann. Stats. 1906, §§ 4473-4476. • **Montana**, Rev. Codes 1907, § 6803. • **Nebraska**, Comp. Stats. Ann. 1909, §§ 6734-6736; Ann. Stats. 1909 (Cobbey), §§ 1163-1165. • **Nevada**, Comp. Laws Ann. 1900 (Cutting), § 3297. • **New Mexico**, Comp. Laws 1897, § 2685,

sub-sec. 239. ^m North Dakota, Rev. Codes 1905, § 7075. ⁿ Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 4360; Comp. Laws 1909 (Snyder), § 5696. ^o Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 198. ^p South Dakota, Rev. Codes 1903, C. C. P. § 313. ^q Texas, Civ. Stats. 1897 (Sayles), Art. 1335. ^r Utah, Comp. Laws 1907, § 3194. ^s Washington, Code 1910 (Rem. & Bal.), § 434. ^t Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2888. ^u Wyoming, Rev. Stats. 1899, §§ 4155-4158.

^a Alaska, C. C. P. § 253, same as first two paragraphs of Cal. C. C. P. § 667.

^{b1} Arizona, § 3821. If the defendant in his answer alleges that he is the owner of the property, is entitled to its possession and demands its return, and if on the trial of the case it shall be found that he is its owner, that he was at the time the suit was brought entitled to its possession, then in such trial the value of the property replevied shall be found by the jury, if tried by a jury, and by the court, if tried by the court, together with any damage the defendant may have suffered for the wrongful replevying of the property, then the judgment shall be against the plaintiff and the sureties on the replevin bond for the assessed value of the property, the assessed damages, and for the costs of the suit; and if it shall appear in the trial of the case that plaintiff is in the possession of the property, or that it is under his control, then the judgment shall also be for its return to the defendant at a time and place to be specified in the judgment.

^{b2} Arizona, § 3823. If, at the time of the trial of the case, the plaintiff shall not be in the possession of the property, or the same shall not be under his control, then the above alternative judgment shall not be given, but only the judgment for the value of the property, the damages suffered by its replevin and the costs of the suit. In every such case the judgment shall be against the plaintiff and the sureties on his replevin bond.

^{b3} Arizona, § 3824. If the judgment shall be against the defendant, and at the time thereof he be in the possession of the property by reason of a forthcoming bond given by him whereby he retained the possession of the property, the judgment shall be against the defendant and the sureties on his bond for the assessed value of the property, the assessed damages for its detention and the costs of suit; and also for the return of the property to the plaintiff, at a time and place to be therein named, and upon the same terms and conditions the plaintiff

shall be given the same election as is provided above shall be given to the defendant.

^c Arkansas, § 6868, same as Alaska C. C. P. § 253.

^d Colorado, C. C. P. § 246, same as Alaska C. C. P. § 253.

^e Iowa, § 4176. The judgment shall determine which party is entitled to the possession of the property, and shall designate his rights therein, and if such party have not the possession thereof, shall also determine the value of the right of such party, which right shall be absolute as to an adverse party, and shall also award such damages to either party as he may be entitled to for the illegal detention thereof. If the judgment be against the plaintiff for the money value of the property, it shall also be against the sureties on his bond.

^f Kansas, § 5067, substantially same as first two paragraphs of Cal. C. C. P. § 667, except in line 3, after "possession" insert "or for the recovery of the possession," before "or the value thereof." (Amended Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 185.)

^g Minnesota, § 4267. In an action to recover the possession of personal property, judgment may be rendered for the plaintiff and for the defendant, or for either. Judgment for either, if the property has not been delivered to him, and a return is claimed in the complaint or answer, may be for the possession, or for the value thereof in case possession can not be obtained, and damages for the detention, or the taking and withholding thereof. When the prevailing party is in possession of the property, the value thereof shall not be included in the judgment. If the property has been delivered to the plaintiff, and the action be dismissed before answer, or if the answer so claim, the defendant shall have judgment for a return, and damages, if any, for the detention, or the taking and withholding, of such property; but such judgment shall not be a bar to another

action for the same property or any part thereof.

h1 Missouri, § 4473. If the plaintiff fail to prosecute his action with effect and without delay, and shall have the property in his possession, and the defendant in his answer claims the same and demands a return thereof, the court or a jury may assess the value of the property taken, and the damages for taking and detaining the same, for the time such property was taken or detained from defendant until the day of the trial of the cause.

h2 Missouri, § 4474. In such case, the judgment shall be against the plaintiff and his sureties, that he return the property taken, or pay the value so assessed, at the election of the defendant, and also, pay the damages assessed for the taking and detention of the property and costs of suit.

h3 Missouri, § 4475. If the plaintiff have not the property in possession, damages shall be assessed as directed in section 4473 of this chapter, for the taking or detention, or both, as the case may be, of the property; and judgment shall be rendered against the plaintiff and his sureties for the damages, if any, and for costs of suit.

h4 Missouri, § 4476. If the defendant fail in his defense, and have the property in possession, the court or jury shall assess the value of the property, and the damages for all injuries to the property, and for the taking and detention, or detention, of the same; and the judgment shall be against the defendant and his sureties, that he return the property or pay the value so assessed, at the election of the plaintiff, and, also, pay the damages so assessed and costs of suit. If the defendant have not the property in possession, the court or jury shall assess the damages, and the judgment shall be against the defendant and his sureties for the damages so assessed and costs of suit; and, in all cases, the property shall be presumed to be with the party who should have it, until the contrary be shown.

i Montana, § 6803, same as Alaska C. C. P. § 253.

j1 Nebraska, § 6734. The judgment in the cases mentioned in sections one hundred and ninety, and one hundred and ninety-one, and in section one thousand and forty-one of said code, shall be for a return of the property or the value

thereof in case a return cannot be had, or the value of the possession of the same, and for damages for withholding said property, and costs of suit.

j2 Nebraska, § 6735. In all cases, when the property has been delivered to the plaintiff, where the jury shall find for the plaintiff, on an issue joined, or on inquiry of damages upon a judgment by default, they shall assess adequate damages to the plaintiff for the illegal detention of the property; for which, with costs of suit, the court shall render judgment for defendant [plaintiff].

j3 Nebraska, § 6736. When the property claimed has not been taken, or has been returned to the defendant by the sheriff for want of undertaking required by section one hundred and eighty-six, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper; but if the property be returned for want of the undertaking required by section one hundred and eighty-six, the plaintiff shall pay all costs made by taking the same.

k Nevada, § 3297, substantially same as Cal. C. C. P. § 667, except in third paragraph, omit entirely the second clause or sentence commencing "and in all actions for the recovery of money," down to and including the words "so alleged in the complaint"; also add at the end of the section the words "and in all cases of damage the judgment shall be for gold coin."

l New Mexico, § 2685, sub-sec. 239. In case the plaintiff fails to prosecute his suit with effect and without delay judgment shall be given for the defendant and shall be entered against the plaintiff and his securities for the value of the property taken, and double damages for the use of the same from the time of delivery, and it shall be in the option of the defendant to take back such property or the assessed value thereof. (Laws 1907, p. 282.)

m North Dakota, § 7075, substantially same as first two paragraphs of Cal. C. C. P. § 667, except after the word "possession" in the second line insert, "or for the recovery of possession."

n Oklahoma, § 4360, substantially same as North Dakota § 7075.

o Oregon, § 198, substantially same as Alaska C. C. P. § 253.

p South Dakota, C. C. P. § 313, substantially same as North Dakota § 7075.

q Texas, Art. 1335. The judgment of the court shall conform to the pleadings, the nature of the case proved and the verdict, if any, and shall be so framed as to give the party all relief to which he may be entitled either in law or equity.

r Washington, § 434, substantially same as Alaska C. C. P. § 253.

s Wisconsin, § 2888. In any action of replevin judgment for the plaintiff may be for the possession or for the recovery of possession of the property, or the value thereof in case a delivery cannot be had, and of damages for the detention; and when the property shall have been delivered to the defendant, under section 2722, judgment may be as aforesaid or absolutely for the value thereof, and damages for the detention at the plaintiff's option. If the property have been delivered to the plaintiff and a defendant claim a return thereof judgment for the defendant may be for a return of the property or the value thereof, in case a return cannot be had, and damages for taking and withholding the same.

t Wyoming, § 4155. When judgment is rendered against the plaintiff on demurrer, or he fails to prosecute his action to final judgment, the court shall, on application of the defendant, assess to defendant proper damages, including damages for the right of property or possession, or both, if he prove himself entitled thereto, or cause the same to be done by a jury, for which, with costs of suit, the court shall render judgment for the defendant.

u Wyoming, § 4156. When the prop-

erty is delivered to the plaintiff, or remains in the hands of the sheriff, as provided in section four thousand one hundred and fifty-one, if the jury, upon issue joined, find for the plaintiff, and upon inquiry of damages upon a default, they shall assess adequate damages to the plaintiff for the illegal detention of the property, for which, with costs of suit, the court shall render judgment for the plaintiff.

v Wyoming, § 4157. When the property is delivered to the plaintiff, or remains in the hands of the sheriff, as provided in section four thousand one hundred and fifty-one, if the jury upon issue joined, find for the defendant, they shall also find whether the defendant had the right of property or the right of possession only, at the commencement of the suit; and if they find either in his favor, they shall assess to him such damages as they think right and proper, for which, with costs of suit, the court shall render judgment for the defendant against the plaintiff and his sureties.

w Wyoming, § 4158. When the property claimed is not taken, or is returned to the defendant by the sheriff for the want of the undertaking required by section four thousand one hundred and fifty, the action may proceed as one for damages only, and the plaintiff shall be entitled to such damages as are right and proper, but if the property be returned for want of the undertaking, the plaintiff shall pay all costs made by taking the same.

Compelling delivery of specific personal property.

California, § 3380. Any person having the possession or control of a particular article of personal property, of which he is not the owner, may be compelled specifically to deliver it to the person entitled to its immediate possession. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6095. North Dakota, Rev. Codes 1905, § 6608. South Dakota, Rev. Codes 1903, C. C. § 2338.

§ 419. AFFIDAVITS, UNDERTAKINGS, ETC.

FORM No. 985—Affidavit for claim and delivery.

[Title of court and cause.]

[Venue.]

, being duly sworn, deposes and says: That he is the plaintiff in this action; that he is the owner of and entitled to the possession of the following-described goods and chattels, namely: [Here describe the same], and which goods and chattels are of the actual value of \$; that said goods and chattels are wrongfully detained by the defendant from the plaintiff; that the alleged cause of said detention thereof, according to affiant's best knowledge, information, and belief, is [here state the alleged cause of detention]; that said property has not been taken for any tax, assessment, or fine, pursuant to any statute, or seized under an execution or an attachment against the property of the plaintiff. [Or, if seized, and said property is exempt by statute, so state.]

[Signature.]

[Jurat.]

FORM No. 986—Demand directed to the sheriff to take property.

To the sheriff of the county of :

I hereby demand that you take from the defendant herein the personal property mentioned and described in the foregoing affidavit.

A. B., Attorney for plaintiff.

[Date.]

FORM No. 987—Undertaking for the return to the defendant of property taken in claim and delivery.

[Title of court and cause.]

The property which is described in the affidavit of the plaintiff in this action as [describe the property as in such affidavit], having been taken from said defendant by the sheriff of the county of , in this state, and said defendant having demanded and required the return of said property to him:

Now, therefore, in consideration of the premises, and to procure the return of said property to said defendant, we, the undersigned, and , undertake to the effect that we are bound to , the plaintiff in the action, in the sum of \$, being double the actual value of the property as stated in the affidavit of

plaintiff, and we promise plaintiff that if delivery thereof be adjudged, the defendant will deliver said property to said plaintiff, and will pay to plaintiff such sum, damages or charges, as may for any cause be recovered against the defendant in said action.

[Date.]

[Signatures.]

FORM No. 988—Approval of undertaking by sheriff.

I hereby approve the within undertaking, both as to the sufficiency of the amount and as to the sureties who executed the same.

[Date.]

[Sheriff's signature.]

FORM No. 989—Claim of property by third person, and demand for return thereof.

[Title of court and cause.]

[Venue.]

, being duly sworn, says: That he is the owner [or he has the right to the possession] of the following-described property. to wit: [Here describe]; that said property has been taken possession of by you as sheriff, under a writ of attachment as such in the above-entitled action; that said ownership [or right of possession] is founded on the grounds, to wit, that [here state the grounds of said ownership, or right of possession]; that affiant claims said property on said grounds, and demands the immediate return of the same and all thereof.

[Jurat.]

[Signature.]

FORM No. 990—Undertaking on behalf of plaintiff, given on claim made by third person to property attached.

[Title of court and cause.]

The plaintiff in this action having claimed possession of the following property: [Here describe the same]; and the plaintiff, by proceedings in this action, having caused _____, the sheriff of the county of _____, in this state, to take the said property from the possession of the defendant; and one _____ having presented and served his verified claim, wherein said claimant sets forth his alleged title to said property and the grounds thereof, and claims the right of possession of such property thereunder, and said claimant having demanded that he be indemnified against said claim of said _____ :

Now, therefore, we, and , in consideration of the premises, and to indemnify , said sheriff, from any and all loss by reason of said claim, do hereby undertake in the sum of \$, and promise , said sheriff, that , the plaintiff in said action, will indemnify , said sheriff, against said claim, and against all loss and damage he may sustain by reason thereof; and if said plaintiff fail to do so, we will pay to said all loss and damage he may sustain by reason of such claim, not exceeding said sum of \$.

[Date.]

[Signatures.]

FORM No. 991—Undertaking to indemnify sheriff.

[Title of court and cause.]

, as the sheriff of the county of , in this state, being about to attach the property of the defendant in this action by virtue of a writ of attachment issued therein:

Now, therefore, in consideration of the premises, and for the purpose of giving security and to prevent the levy of such attachment, we, and , hereby undertake and promise the plaintiff in this action, and are bound to him in the sum of \$, being an amount sufficient to satisfy plaintiff's demands, besides costs, or an amount equal to the value of the property about to be attached, that the defendant will satisfy any judgment which the plaintiff may recover against him in this action.

[Date.]

[Signatures.]

§ 420. VERDICTS, JUDGMENTS, AND EXECUTIONS.**FORM No. 992—Verdict for the plaintiff. (In general.)**

[Title of court and cause.]

We, the jury in the above-entitled action, find for the plaintiff: That he is the owner, and entitled to the immediate possession, of the property described in the complaint [or petition] herein, and we assess the value of said property at \$, and the plaintiff's damage, by reason of the detention and withholding thereof, at the sum of \$.

[Date.]

X. Y., Foreman.

FORM No. 993—Verdict as to special interest and damages.

[Title of court and cause.]

We, the jury in the above-entitled action, find for the plaintiff: That he is the owner of a special interest in the property described in the complaint [or petition] herein, to wit, [here state]; that the value of said entire property is \$, and that the value of said special interest of plaintiff therein is \$; that the plaintiff is entitled to the immediate possession of said property, by virtue of his said special interest therein, and that, subject to such special interest, defendant is the general owner of said property. We furthermore find and assess the plaintiff's damages, by reason of the taking and withholding of said property, at the sum of \$.

[Date.]

X. Y., Foreman.

FORM No. 994—Alternative judgment for plaintiff in replevin.

[Title of court and cause.]

This action having been tried before the court and a jury [or without a jury, trial by jury having been expressly waived], and the court [or the jury] having found for the plaintiff, that he is the owner, and entitled to the immediate possession, of the property described in the complaint [or petition] herein, and the court [or jury] having assessed the value of said property at the sum of \$, and it appearing from the return of the sheriff herein and from the undertaking filed herein on the part of the defendant that said property was delivered to the defendant, and that and are defendant's sureties who signed said undertaking in the sum of \$, pursuant to the statute, said sureties being bound as therein required for the delivery of said property to the plaintiff, if such delivery be adjudged, and for the payment of such sum to the plaintiff as might for any cause be recovered against the defendant;

[And the plaintiff having in open court elected to take judgment for the recovery of the possession of said property, or the value thereof in case a delivery can not be had]: Now, on motion of A. B., attorney for the plaintiff,—

It is ordered and adjudged, that C. D., the plaintiff, do have and recover of E. F., the defendant, and and , said sureties, the possession of the property described in the complaint [or petition], as follows: [Here describe said property], together with \$, plaintiff's damages, assessed as aforesaid, for such deten-

tion; and in case a delivery of said property can not be had, then that plaintiff do have and recover of defendant and his said sureties the sum of \$, the value of said property, in addition to his said damages, together with the sum of \$, taxed as costs of this action.

[Date.]

By the court.

M. N., Clerk.

FORM No. 995—Judgment for plaintiff in replevin. (In general.)

[Title of court and cause.]

[After preliminary recitals as in the preceding form:]

It is ordered and adjudged, that C. D., plaintiff, do have and recover of E. F., defendant, and and , his said sureties upon said undertaking, the sum of \$, the value of said property, and the further sum of \$, as plaintiff's damages, assessed as aforesaid, for the detention thereof, together with the further sum of \$, taxed and allowed as costs herein, making in all the sum of \$.

[Date.]

By the court.

M. N., Clerk.

FORM No. 996—Execution in replevin.

The people of the state of , to the sheriff [or other officer, designating his official capacity] of the county of :

Whereas, a judgment was rendered on the day of , 19 , in the court, in an action in said court wherein was plaintiff and was defendant, in favor of the defendant and against the plaintiff, for the sum of \$, damages and costs, and for the further sum of \$; and if the latter sum is not collected, for the delivery by the plaintiff to the defendant of the following-described personal property, to wit: [Particularly describe the same; or state as follows: "And that he is entitled to the possession of the following-described personal property, to wit: (Particularly describing the same), until the said sum of \$ is collected and paid"]; and

Whereas, the judgment-roll upon said judgment was filed in the clerk's office of the county of on the day last aforesaid, [and a transcript of said judgment was duly filed,] and said judgment

was duly docketed in the office of the clerk of your county on the
day of , 19 ; and

Whereas, there is now actually due upon said judgment the sum
of \$, damages and costs, as aforesaid, with interest thereon
from the day of , 19 , and the further sum of \$,
with interest thereon from the day of , 19 :

Now, therefore, you are hereby required to deliver possession of
the said personal property to the defendant, unless the plaintiff,
before the delivery, pays to you the said sum of \$, with
interest as aforesaid, and your fees; and in case the said personal
property can not be found within your county, then to satisfy that
sum out of any personal property belonging to the plaintiff; and if
sufficient personal property belonging to the plaintiff can not be
found, then out of the real property belonging to him at the time
when said judgment was docketed in the clerk's office of the county
of , or at any time thereafter.

And you are further required to satisfy the said sum of \$,
damages and costs as aforesaid, out of the personal property of the
said judgment debtors, or either of them; and if sufficient personal
property can not be found, out of the real property belonging to
them [or either of them] at the time when said judgment was dock-
eted in the clerk's office of the county of , or at any time
thereafter; and to return this execution to the clerk of the county
of within [sixty] days after the receipt hereof.

Witness [etc.].

§ 421. COMPLAINTS [OR PETITIONS].

FORM No. 997—For claim and delivery of personal property.

[Title of court and cause.]

, the plaintiff in the above-entitled action, complaining of
the defendant in said action, alleges:

1. That on the day of , 19 , at the county of ,
plaintiff was the owner and in the possession of the following goods
and chattels, of the value of \$, to wit: [Here describe said
goods and chattels with sufficient certainty to enable the officer
levying thereon to accurately identify the same.]

2. That the defendant, on the day of , 19 , at the
county of , without the consent of said , plaintiff, wrong-

ly took said goods and chattels from the possession of the plaintiff.

. That before the commencement of this action, to wit, on the day of , 19 , the plaintiff demanded of the defendant session of said goods and chattels; but to deliver the possession thereof the defendant refused.

4. That defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to his damage in the sum of \$.

Wherefore, the plaintiff demands judgment against the defendant for the recovery of the possession of said goods and chattels, or for the sum of \$, the value thereof, in case a delivery can not be had, together with \$ damages and costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 998—Goods taken from possession of plaintiff's assignor.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That at the time first hereinafter mentioned, one C. D. owned and was lawfully in the possession of [describe property], of the value of \$, and that on the day of , 19 , the defendant wrongfully took said goods from the possession of the said C. D., and has ever since detained the same.

2. That on the day of , 19 , the said C. D. assigned and set over to the plaintiff the said goods, and also his claim for damages for said taking and detention, and by reason of the premises the plaintiff has sustained damage in the sum of \$.

[Concluding part.]

FORM No. 999—To recover property severed from realty.

(In *Houghton Co. v. Kennedy*, 8 Cal. App. 777; 97 Pac. 905.)

[Title of court and cause.]

Plaintiff complains of defendants, and for cause of action alleges:

1, 2. [Averments as to incorporation of plaintiff company, and as to certain of defendants sued under fictitious names.]

3. That on the 25th day of August, 1905, and for more than three months prior thereto, at and in the county of Fresno, state of California, plaintiff was, ever since has been, and now is the owner and entitled to the possession of the following-described property, to

wit: One steam-engine and one bunkhouse, 15 by 20 feet in size, a little more or less, all on said date situated upon block 8 in the town of Rolinda, said personal property being, prior to the severance herein complained of, appurtenant to said lands and a part and parcel thereof.

4. That said steam-engine is, and then was, of the value of \$600, and said bunkhouse is, and then was, of the value of \$100.

5. That the defendants herein, on or about the 25th day of August, 1905, at and in said county, without plaintiff's consent, and wrongfully and unlawfully, entered upon the premises above described, so belonging to plaintiff, and forcibly and wrongfully broke into the building in which said steam-engine was located, and removed said steam-engine from said premises, and at the same time did wrongfully and unlawfully enter upon said premises and seize and take said bunkhouse and remove the same therefrom.

6. That the defendants ever since said date have wrongfully and unlawfully withheld and detained, and now wrongfully withhold and detain, said property from the possession of plaintiff, to its damage in the sum of \$300.

7. That the said property has not been taken for any tax, assessment, or fine pursuant to any statute, or seized under an execution or an attachment against the property of the plaintiff.

Wherefore, plaintiff prays judgment against the defendants for the recovery of the possession of said personal property, or for the sum of \$700, the value thereof in case a delivery can not be had, together with \$300 damages, and for its costs of suit; further, that said property be taken from said defendants by the sheriff of said county in claim and delivery, and held in accordance with the law in such cases made and provided, and that it may have such other and further relief as to the court may seem proper in the premises.

F. E. Cook,

[Verification.]

Attorney for plaintiff.

FORM No. 1000—By married woman, to recover possession of separate personal property or the value thereof.

(In *Richey v. Haley*, 138 Cal. 441; 71 Pac. 499.)

[Title of court and cause.]

The plaintiff complains of the defendant, and for cause of action alleges:

1. That plaintiff is a married woman, and the wife of Charles S. Richey, and that the property herein sued for and hereinafter described is the sole and separate property of the plaintiff.

2. That on the 12th day of November, 1897, in the county of Santa Clara, plaintiff was the owner and in the actual possession of the following goods and chattels, to wit: [Here follows a description of said property]; that said goods and chattels were at said time, and ever since have been, of the value of \$420.

3. That the defendant, on the 12th day of November, 1897, in the said county of Santa Clara, without the consent of plaintiff, wrongfully took said goods and chattels from the possession of the plaintiff.

4. That before the commencement of this action, to wit, on the 13th day of November, 1897, and again on the 2d day of December, 1897, the plaintiff demanded of the defendant possession of said goods and chattels, but to deliver the possession thereof the defendant refused.

5. That defendant still unlawfully withholds and detains said goods and chattels from the possession of the plaintiff, to her damage, by reason of said withholding and detention, in the sum of \$200.

[Concluding part.]

§ 422. ANSWERS.

FORM No. 1001—Defense of general denial.

[Title of court and cause.]

The defendant answering the complaint [or petition] of the plaintiff, denies:

1. That the plaintiff was ever in possession or entitled to the possession of the goods and chattels in the complaint [or petition] described, or any thereof.

2. That the said goods and chattels, or any of them, are or ever were the property of the plaintiff.

3. That said goods and chattels are or were at the time alleged, or at any time since, of the value of \$, or any amount greater than \$.

[Concluding part.]

FORM No. 1002—Defense that title is in another than the plaintiff.

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition], alleges:

That the property therein described was at the time therein mentioned, and still is, the property of one C. D., and not the property of the plaintiff.

[Concluding part.]

FORM No. 1003—Defense that defendant is part owner.

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition], alleges:

That at the several times therein mentioned, the defendant was, and still is, the owner of one undivided half of said goods and chattels, and that the whole of the same then were rightfully in the possession of the defendant.

[Concluding part.]

FORM No. 1004—Defense that defendant is entitled to a lien on goods for storage [or freight].

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition], alleges:

1. That on the day of , 19 , the plaintiff deposited the goods mentioned in the complaint [or petition] with the defendant for storage [or for carriage], agreeing to pay for the said storage [or carriage] of the same as follows: [State terms of agreement.]

2. That the defendant duly performed all the conditions of said contract on his part, and carefully and safely stored said goods [or safely transported the same according to his said agreement], and has always been, and still is, ready and willing to deliver the said goods to the plaintiff [or to his consignee] upon payment of the sum due for storage [or freight].

3. That the plaintiff has not paid or tendered to the defendant the said sum, or any part thereof.

[Concluding part.]

FORM No. 1005—Defense by common carrier, claiming lien for services.—
Replevin, by the United States of America, to recover
goods and supplies transported.

(In *Union Pacific R. Co. v. United States*, 2 Wyo. 170.)

[Title of court and cause.]

Now comes the defendant, the Union Pacific Railroad Company, and for answer to the petition of the United States of America, says:

1. That it denies each and every of the allegations stated and contained in the said petition, except that the said defendant was a corporation as therein alleged. And of this the said defendant puts itself upon the country.

2. And the defendant, for a further answer to the petition of plaintiff, says: That it is a common carrier of goods and merchandise for hire and reward, from the city of Oklahoma, in the state of Nebraska, to the town of Rawlins, in the territory of Wyoming; that as such common carrier it received the said goods and chattels in the plaintiffs' petition mentioned long prior to the commencement of the action herein, at Omaha aforesaid, from one Dwight J. McCann, then lawfully in the possession and control of the said goods and chattels, for transportation to Rawlins, in the territory of Wyoming, and that thereafter, as a common carrier, the said defendant carried and transported the said goods and chattels from said Omaha to said Rawlins; that under and by virtue of the contract under which the said goods and merchandise were carried and transported the defendant was to have the right to retain the possession of the said goods, chattels, and merchandise, and of each and every part thereof, until its charges for the carriage, transportation, and storage of the same should be fully paid and discharged; that its charges for the carriage, transportation, and storage of said goods, wares, and merchandise have not, nor has any part thereof, ever been paid; that its charges as aforesaid on the 20th day of November, 1877, amounted to the sum of \$588.16, to wit, for freight and transportation, \$496.86, and \$91.30 for storage; that on the 20th day of November, 1877, under and by virtue of the contract aforesaid, and under its lien as a common carrier, it had a special ownership in the said property, goods, wares, and merchandise, in the plaintiff's petition mentioned, and in each and every part thereof, and on said date was entitled to the possession of the said property, and of each and every part thereof; that, therefore, plaintiff wrongfully and

unlawfully deprived the defendant of the possession of the property in the plaintiff's petition mentioned, to the damage of the defendant in the sum of \$588.16.

Wherefore, the defendant prays judgment against the plaintiff for the said sum of \$588.16, with interest thereon since the 20th day of November, 1877, and costs of this action.

W. R. Steele,
Attorney for defendant.

FORM No. 1006—Defense of lien for services for manufacturing.

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition], alleges:

1. That said goods were manufactured by the defendant, as [here state], and were detained by him by virtue of his lien as a mechanic and the manufacturer thereof as security for the payment of \$, which is the amount due him from the plaintiff for work and labor in manufacturing them.

2. That the defendant has always been, and still is, ready and willing to deliver the said goods to the plaintiff upon receiving the said amount, but the plaintiff has not paid or tendered the same, which is still due and unpaid.

FORM No. 1007—Defense by sheriff.—Justification of taking under attachment.

[Title of court and cause.]

The defendant answering the plaintiff's complaint [or petition], alleges:

1. That on the day of , 19 , one C. D. was, and from that time until the day of , 19 , remained, the sole owner of all the goods and chattels described in the complaint [or petition].

2. That on the day of , 19 , an action was duly commenced by one E. F. against the said C. D., in the court of the county of , in the state of , to recover \$, alleged to be due for [state what].

3. That on the said date a summons was issued in due form in the last-named action, and on said date was duly served upon the said C. D. by the defendant, as the sheriff of the county of , by

delivering to the said C. D., personally a true copy thereof, attached to a copy of the complaint [or petition] therein, at .

4. That on said date a writ of attachment was duly issued in due form in the said last-named action, after the summons was issued therein, and placed in the hands of the defendant, as sheriff aforesaid; that on said date the said sheriff delivered a true copy of said writ of attachment to , in whose possession the property described in said complaint [or petition] then was, together with a written notice signed by said sheriff, endorsed on said copy of said writ of attachment, and directed to said , notifying him that all moneys, goods, credits, effects, debts due or owing, or any other personal property in his possession or under his control belonging to said C. D., were attached by virtue of said writ of attachment, and not to pay over or transfer the same to any one but him, the said sheriff.

5. That thereafter, to wit, on the day of , 19 , judgment was duly made, rendered, and entered in said last-named action, in said court, against said C. D., and in favor of said E. F., for the sum of \$.

6. That on the day of , 19 , an execution was duly issued in due form in said court, under and by virtue of said judgment, which execution was on said last-mentioned date placed in the hands of the defendant, as sheriff, for service.

7. That said sheriff executed the same by delivering to said , personally, on the day of , 19 , at , a true copy of said execution, and a notice, in writing, notifying said that all moneys, goods, credits, effects, debts due or owing, or any property in his possession or under his control, belonging to the said C. D., were levied upon by virtue of said writ of execution, and not to pay over or transfer the same to any one but him, the said sheriff, and by delivering to the said C. D. personally, on the day of , 19 , at , a true copy of said writ of execution and notice, together with a description of the property levied upon.

8. That said sheriff, by virtue of said writ of execution, duly levied upon, on the day of , 19 , all the right, title, and interest of said C. D. in and to the property described in the complaint, the same then being in the possession of said , and being the sole property of the said C. D., by taking all of said property into his possession, and by delivering to said , on

the day of , 19 , a true copy of said writ of execution, together with a description of all of said property, and a written notice that said property, and all the right, title, and interest of said C. D. therein, was levied upon, and by delivering to said C. D. personally on the day of , 19 , at , a true copy of said writ of execution, description, and notice.

9. That said sheriff, on the day of , 19 , duly advertised all of said property in accordance with law, by posting notices of sale, particularly describing said property, in public places in , advertising said property to be sold at public auction in view thereof, at [place of sale], on , 19 , between the hours of and , and that on said day all of said described property was by said sheriff, at the hour of , and at the place aforesaid, exposed for sale at public auction, and was sold in separate lots or parcels to the highest and best bidders for cash, the whole thereof being sold for the sum of \$, which said sum, less the sum of \$, sheriff's costs, was on the day of , 19 , credited on said execution and judgment.

10. [Denial that plaintiff was the owner or in possession of said goods and chattels, or any thereof.]

[Concluding part.]

FORM No. 1008—Defenses—(1) that foreign corporation plaintiff had not filed articles or designated resident agent, (2) justification of the taking of outlawed and gambling devices, (3) specific denials of value, etc.—In replevin, by foreign corporation.

(In *Mills Novelty Co. v. Dunbar*, 11 Idaho 671; 83 Pac. 932.)

[Title of court and cause.]

[After introductory part and admission of incorporation of plaintiff, the answer avers in substance:] * * * That the plaintiff has not filed a copy of its articles, certified or otherwise, in the office of the secretary of state of the state of Idaho, and has not, in writing or otherwise, designated any person residing within the state as its agent upon whom legal process may be served, and denies that the plaintiff was, on the 22d day of October, 1904, or at any other time, at the city of Boise, or any other place within the state of Idaho, lawfully possessed of said slot-machines, or that the plaintiff was at the commencement of this action, or at any time

since, entitled to the possession of said slot-machines; denies that said slot-machines are of the value of \$325, or any other sum; denies that said slot-machines, or any part thereof, were on said date, or at any time, the property of the plaintiff; denies that the plaintiff at any time before the commencement of this action demanded the possession of said slot-machines; denies that he still unjustly detains the same, or ever at any time unjustly detained the same, to the damage of the plaintiff in any sum whatever.

For a second defense, the defendant alleges:

That he is a duly appointed, qualified, and acting justice of the peace in and for Boise Precinct No. 2, Ada County, Idaho; that on the 22d day of October, 1904, information was presented to him as such justice of the peace, by which, as such justice of the peace, he was informed and satisfied that gambling devices, to wit, said nine slot-machines, were then within the said city, and then in operation as such gambling devices in said city; that said information was derived from an affidavit of the prosecuting attorney of said county; that thereupon defendant, acting as such justice of the peace, forthwith issued warrants to "the sheriff or any deputy sheriff or constable in said county," commanding that said slot-machines be brought before him at his office in said city; that thereupon said slot-machines were, under and by virtue of said warrants placed in the hands of A. Anderson, the constable of said county, seized and brought before the defendant, as justice of the peace, to be dealt with according to law and the statute in such cases made and provided, and that such slot-machines were in the custody of the law, and in the possession and under the control of said A. Anderson, as constable, subject to the order of said justice's court, at the time of the commencement of this action,—all of which facts were well known to plaintiff and its agents and attorneys at the time of the institution of this action; that said slot-machines are, and each of them is, adapted to, and designed and designated for, the purpose of being used solely in gambling; that they were at the time the same were seized and for many days prior thereto, * * * being used for the sole purpose of gambling and playing games, at which money was bet and won or lost; that said slot-machines were gambling devices, * * * and that the same and all of them are outlawed property, without value or ownership, at the time of the commencement of this action and at all times since said date; that said

machines are not susceptible of any legitimate use, and that the same, and all thereof, are instruments of crime, designed and devised for the purpose of violating the statutes of this state prohibiting gambling, and are incapable of ownership; that such slot-machines were at the time of the commencement of this action, and at the times mentioned in the complaint, in the possession of the said constable.

Wherefore [etc.].

Quarles & Pritchard,
Attorneys for defendant.

For various other forms in claim and delivery or replevin, see the following (ch. XXIII): Affidavit on claim and delivery, form No. 211; Order and demand upon sheriff, endorsed upon affidavit, form No. 212; Certificate of sheriff, endorsed upon affidavit, form No. 213; Undertaking, form No. 214; Justification of sureties on undertaking, form No. 215; Sheriff's certificate of service of undertaking, form No. 216.

Forms of complaint in actions of replevin: *Wegner v. Second Ward Sav. Bank*, 76 Wis. 242, 44 N. W. 1096; *Scully v. Porter*, 3 Kan. App. 493, 496, 43 Pac. 824, 825.

Form of answer in an action to obtain possession of certain personal property, held by the sheriff under attachment: *Butts v. Privett*, 36 Kan. 711, 14 Pac. 247.

Form of answer in an action in replevin to recover the possession of a warranty deed: *Richards v. Gaskill*, 39 Kan. 428, 18 Pac. 494.

Form of affidavit in replevin: *Gardner v. King*, 37 Kan. 671, 15 Pac. 920, 921.

Form of bond in an action upon a redelivery bond in replevin: *Kennedy v. Brown*, 21 Kan. 171, 175.

Form of redelivery bond in an action in replevin: *Nye v. Weiss*, 7 Kan. App. 627, 53 Pac. 152.

Form of notice of appeal in an action in replevin to recover possession of sundry chattels alleged to be wrongfully taken and withheld by the defendant, sheriff, who seized said property as the property of the defendant: *Corbell v. Childers*, 17 Ore. 528, 21 Pac. 670.

For agreed statement of facts in action to recover personal property or its value, see *Blankinship v. Oklahoma City etc. Co.*, 4 Okla. 242, 43 Pac. 1088.

For agreed statement of facts in action in replevin by the United States of America to recover from common carrier goods and supplies transported by such common carrier and upon which defendant claimed the right of lien for its services, see *Union Pacific R. Co. v. United States*, 2 Wyo. 170.

For agreed statement of facts in action in replevin, and to determine rights and title to property of an attaching creditor whose remedy is perfected, as against an attaching creditor held to have released his lien by laches in pursuing his remedy, see *Speelman v. Chaffee*, 5 Colo. 247.

§ 423. ANNOTATIONS.—Claim and delivery of personal property.—Replevin.

1. Essentials of complaint.
- 2, 3. Allegation as to ownership.
- 4, 5. Possession in defendant an essential.
6. Gist of the action of replevin under the statutes.
- 7-9. When action will lie.
10. Demand in replevin.
11. Demand unnecessary where seizin is unlawful.
12. Defense.—Estoppel to deny taking.
13. Defense as to demurrage tendered.

14. Action upon replevin bond.

15. Dismissed attachment suit not a bar to replevin.

16. Decision in replevin.

1. **Essentials of complaint.**—In a suit to recover personal property, the complaint must show the ultimate fact that the plaintiff was the owner or entitled to the possession at the time of the commencement of the action; and it is not sufficient to merely aver that he was the owner or entitled to the possession at some period prior to that time: *Manti City Sav. Bank v. Peterson*, 30 Utah 475, 86 Pac. 414, 116 Am. St. Rep. 862, (replevin), citing *Fredericks v. Tracy*, 98 Cal. 658, 660, 33 Pac. 750; *Afferback v. McGovern*, 79 Cal. 268, 269, 21 Pac. 837; *Masterson v. Clark* (Cal.), 41 Pac. 796; *Holly v. Heiskell*, 112 Cal. 174, 175, 44 Pac. 466; *Kimball Co. v. Redfield*, 33 Ore. 292, 54 Pac. 216.

2. **Allegation as to ownership.**—In an action of claim and delivery of personal property, a general allegation of ownership is ordinarily sufficient: *Illinois Sewing M. Co. v. Harrison*, 43 Colo. 362, 96 Pac. 177; *Benesch v. Waggner*, 12 Colo. 534, 21 Pac. 706, 13 Am. St. Rep. 254; *Baker v. Cordwell*, 6 Colo. 199; *Hanna v. Barker*, 6 Colo. 303, 313.

3. **Ownership implies right of possession.**—A general allegation of a right to the possession of goods and chattels demanded in replevin is sufficiently maintained by evidence of ownership alone, for the reason that the ownership of property usually carries with it the right of possession; this, however, is subject to any special right to possession of the property, as may be shown by the adverse party: *Krebs Hop Co. v. Taylor*, 52 Ore. 627, 97 Pac. 44, 45, citing *Cassel v. Western Stage Co.*, 12 Iowa 47, as to exception where special right to possession is shown.

4. **Possession in defendant an essential.**—A plaintiff can not recover in an action in claim and delivery where it appears that the defendant did not have the property in his possession at the time of the commencement of the action: *Riclotto v. Clement*, 94 Cal. 105, 29 Pac. 414.

5. **A plaintiff in replevin must recover, if at all, on the strength of his own claim, and a failure to prove his right to the immediate possession of the**

property, where the illegal detention is denied, is a failure of proof upon a material point: *Bardwell v. Stubbart*, 17 Neb. 485, 23 N. W. 444; *Krebs Hop Co. v. Taylor*, 52 Ore. 627, 97 Pac. 44, 46.

6. **Gist of the action of replevin under the statutes.**—An action of replevin at common law could be maintained only when the personal property sought to be recovered was wrongfully taken. The remedy has generally been extended by statute so as to include an unlawful detention, and the gist of the action is now regarded as the wrongful holding by a person of goods, chattels, etc., the right to the immediate possession of which is in another: *Krebs Hop. Co. v. Taylor*, 52 Ore. 627, 97 Pac. 44, 45; *Nunn v. Bird*, 36 Ore. 515, 59 Pac. 808.

7. **When action will lie.**—The action of replevin lies only against the party who wrongfully detains the property in controversy from the complainant,—a fact which must be alleged by the relator in his complaint and proved on the trial: *Barnes v. Plessner*, 137 Mo. App. 571, 119 S. W. 457, 458, citing Mo. Rev. Stats. 1899, § 3901, Ann. Stats. 1906, p. 2156; *Davis v. Randolph*, 3 Mo. App. 454.

8. **An action in claim and delivery for the possession of shares of stock in a corporation, as being intangible property, will not lie:** *Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624; *Bell v. Bank of California*, 153 Cal. 234, 238, 94 Pac. 889.

9. **An action of replevin can not be maintained against one not in the actual or constructive possession of property, unless he has sold, disposed of, or removed the same with intent of avoiding the writ:** *Robb v. Dobrinski*, 14 Okla. 563, 78 Pac. 101, 1 Am. & Eng. Ann. Cas. 981; *Depriest v. McKinstry*, 38 Neb. 194, 56 N. W. 806; *Riclotto v. Clement*, 94 Cal. 105, 29 Pac. 414; *Davis v. Van De Mark*, 45 Kan. 130, 25 Pac. 589; *Gardner v. Brown*, 22 Nev. 156, 37 Pac. 240. See cases enumerated in note to *Robb v. Dobrinski*, supra, 1 Am. & Eng. Ann. Cas. 984.

10. **Demand in replevin.**—The better rule would appear to be that a demand is not an essential averment in replevin; for, as it has been well said, "if the

plaintiff is entitled to immediate possession, the detention by the defendant is wrongful; if, however, no demand be made before the institution of the suit, and the original possession of the defendant were lawful, he may tender the property to the plaintiff, and, upon its delivery, by proper plea, discharge the action. But if, instead of this course, he denies the right of the plaintiff, and contests the action upon its merits, he can not, after a verdict against him, defeat a recovery on the ground that there was no demand. The writ is a demand, and defending the suit a refusal": *Citizens' State Bank v. Chattanooga State Bank* (Okla.), 101 Pac. 1118, 1120, quoting from *Dearing v. Ford*, 13 Smedes & M. (Miss.), 274, and referring for cases supporting this rule to 24 Am. & Eng. Ency. Law, 2d ed., p. 510, notes 4, 6.

11. Demand unnecessary where seizure is unlawful.—Where the seizure is unlawful, it is not necessary to allege a demand in replevin: *Krebs Hop Co. v. Taylor*, 52 Ore. 627, 97 Pac. 44, 45; *Surles v. Sweeney*, 11 Ore. 21, 4 Pac. 469; *Moorhouse v. Donaca*, 14 Ore. 430, 13 Pac. 112.

12. Defense.—Estoppel to deny taking.—Where to the complaint in an action in claim and delivery to recover the possession of certain cattle, the defendant answered and alleged the taking of the property described in the complaint, together with other property, in a chattel mortgage, and afterwards upon the trial offered to show that the stock did not answer the description contained in the complaint; held, that such evidence was properly rejected, inasmuch as by its answer the defendant had estopped itself from claiming that it had not taken the property described in the complaint, there being no request made to amend the answer: *Kime v. Edgemont*, 22 S. Dak. 630, 119 N. W. 1003.

13. Defense as demurrage tendered.—A defense to an action in replevin to

recover from defendant, a railway corporation, under the laws of Missouri, the possession of certain specifically described lumber, which defense is based upon a count in which the defendant alleges a certain tender of demurrage as to each car, but fails to allege that the amount so tendered was a reasonable sum for such charges, and fails, in view of an interstate commerce regulation, to aver that the amounts were sufficient to meet the same; held, that the demurrer was properly sustained thereto: *Darlington L. Co. v. Missouri Pacific R. Co.*, 216 Mo. 658, 116 S. W. 530, 537.

14. Action upon replevin bond.—In all suits on replevin bonds, it is provided in the Missouri statutes (Rev. Stats. 1899, § 3924, Ann. Stats. 1906, p. 2165) that where the action is dismissed for want of jurisdiction, the defendant therein shall have a right of action on the bond, but that in such action the defendants (plaintiffs in the original action) "shall have the right to set up as a defense the ownership or the right of possession of the property involved in the original replevin suit": *Bailey v. Dennis*, 135 Mo. App. 93, 115 S. W. 506, 507.

15. Dismissed attachment suit not a bar to replevin.—The bringing of an attachment suit which is dismissed before judgment does not bar a suit in replevin arising out of the same transaction: *Johnson-Brinkman Com. Co. v. Missouri Pacific R. Co.*, 126 Mo. 344, 28 S. W. 870, 26 L. R. A. 840, 47 Am. St. Rep. 675, approved in *Tower v. Compton Hill I. Co.*, 192 Mo. 379, 91 S. W. 104.

16. The decision in replevin should respond to all the issues raised by the pleadings, and, as unlawful detainer is the gist of the action, should speak unequivocally as to that: *Barnes v. Plessner*, 137 Mo. App. 571, 119 S. W. 457, 458; *Mercer v. James*, 6 Neb. 406; *Smith v. Smith*, 17 Ore. 444, 21 Pac. 449.

CHAPTER CXXIII.

Injunction.

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§ 424. CODE PROVISIONS.

Preventive relief, how granted.

California, § 3420. Preventive relief is granted by injunction, pro-
visional or final. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6118. North Dakota, Rev. Codes 1905, § 6628.
South Dakota, Rev. Codes 1903, C. C. § 2359.

Provisional injunctions.

California, § 3421. Provisional injunctions are regulated by the Code of Civil Procedure. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6119. North Dakota, Rev. Codes 1905, § 6629. South Dakota, Rev. Codes 1903, C. C. § 2360.

Injunction to prevent breach of an obligation.

California, § 3422. Except where otherwise provided by this title, a final injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:

1. Where pecuniary compensation would not afford adequate relief;
2. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
3. Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or,
4. Where the obligation arises from a trust. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Iowa, Ann. Code 1897, § 4354. Montana, Rev. Codes 1907, § 6120. North Dakota, Rev. Codes 1905, § 6630. South Dakota, Rev. Codes 1903, C. C. § 2361.

Iowa, § 4354. An injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of the code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action by ordinary proceedings, he may, in the same cause,

pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the commission of any breach of contract or injury of a like kind arising out of the same contract or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress.

When injunction cannot be granted.

California, § 3423. An injunction cannot be granted:

1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings.
2. To stay proceedings in a court of the United States.

3. To stay proceedings in another state upon a judgment of a court of that state.

4. To prevent the execution of a public statute, by officers of the law, for the public benefit.

5. To prevent the breach of a contract, the performance of which would not be specifically enforced.

6. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession.

7. To prevent a legislative act by a municipal corporation. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Arizona, Rev. Stats. 1901, § 2743. ^b Arkansas, Dig. of Stats. 1904 (Kirby), § 3986. ^c Iowa, Ann. Code 1897, § 4364. Montana, Rev. Codes 1907, § 6121. North Dakota, Rev. Codes 1905, § 6631. South Dakota, Rev. Codes 1903, C. C. § 2362. ^d Washington, Code 1910 (Rem. & Bal.), § 471. ^e Wyoming, Rev. Stats. 1899, § 3802.

^a Arizona, § 2743. No injunction shall be granted to stay any judgment or proceedings at law, except so much of the recovery or cause of action as the complainant shall in his complaint show himself equitably entitled to be relieved against, and so much as will cover the costs.

^b Arkansas, § 3986. An injunction to stay proceedings on a judgment or final order of a court shall not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment or order was rendered or made. Nor shall such injunction be granted unless the party applying therefor makes affidavit that no injunction has been previously granted to stay the proceedings on such judgment or order.

^c Iowa, § 4364. When proceedings in a civil action, or on a judgment or final order, are sought to be enjoined, the ac-

tion must be brought in the county and court in which such action is pending or the judgment or order was obtained, unless such judgment or final order is obtained in the supreme court, in which case the action must be brought in the county and court from which the case was taken to the supreme court.

^d Washington, § 471. The party seeking to vacate or modify a judgment or order may obtain an injunction suspending proceedings on the whole or part thereof, which injunction may be granted by the court or the judge, upon its being rendered probable, by affidavit or petition sworn to, or by exhibition of the record, that the party is entitled to have such judgment or order vacated or modified.

^e Wyoming, § 3802, substantially same as Washington § 471, except in line 7, after "affidavit" omit "or petition sworn to" before "or by exhibition."

Injunction—When it may and may not be granted.

California, § 526. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists

in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it appears by the complaint or affidavits that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury, to a party to the action;

3. When it appears, during the litigation, that a party to the action is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the rights of another party to the action respecting the subject of the action, and tending to render the judgment ineffectual;

4. When pecuniary compensation would not afford adequate relief;

5. Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

6. Where the restraint is necessary to prevent a multiplicity of judicial proceedings;

7. Where the obligation arises from a trust.

[When cannot be granted.] An injunction cannot be granted:

1. To stay a judicial proceeding pending at the commencement of the action in which the injunction is demanded, unless such restraint is necessary to prevent a multiplicity of such proceedings;

2. To stay proceedings in a court of the United States;

3. To stay proceedings in another state upon a judgment of a court of that state;

4. To prevent the execution of a public statute by officers of the law for the public benefit;

5. To prevent the breach of a contract, the performance of which would not be specifically enforced;

6. To prevent the exercise of a public or private office, in a lawful manner, by the person in possession;

7. To prevent a legislative act by a municipal corporation. (Kerr's Cyc. Code Civ. Proc. Amended March 16, 1907, Stats. and Amdts. 1907, p. 341.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Alaska, Ann. Codes 1907, C. C. P. (Carter), § 386. • Arizona, Rev. Stats. 1901, § 2742. • Arkansas, Dig. of Stats. 1904 (Kirby), § 3965. • Colorado, Rev. Stats. 1908, C. C. P. § 159. • Idaho, Rev. Codes 1909, § 4288. • Iowa, Ann. Code 1897, § 4354. • Kansas, Gen. Stats. 1905 (Dassler), § 5133. • Minnesota, Rev. Laws 1905, § 4259. • Missouri, Ann. Stats. 1906, § 3630. • Montana, Rev.

Codes 1907, § 6643. * Nebraska, Comp. Stats. Ann. 1909, § 6801; Ann. Stats. 1909 (Cobbey), § 1230. † Nevada, Comp. Laws Ann. 1900 (Cutting), § 3207. ‡ North Dakota, Rev. Codes 1905, § 6930. § Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 4425; Comp. Laws 1909 (Snyder), § 5756. ° Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 420. † South Dakota, Rev. Codes 1903, C. C. P. § 197. ‡ Texas, Civ. Stats. 1897 (Sayles), Art. 2989. † Utah, Comp. Laws 1907, § 3058. § Washington, Code 1910 (Rem. & Bal.), § 719. † Wisconsin, Stats. 1898 (San. & Ber. Ann.), §§ 2774, 2775. † Wyoming, Rev. Stats. 1899, § 4039.

‡ Alaska, C. C. P. § 386. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce injury to the plaintiff; or when it appears by affidavit that the defendant is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights concerning the subject of the action, and tending to render the judgment ineffectual; or when it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, or any part thereof, with intent to delay or defraud his creditors, an injunction may be allowed to restrain such act, removal, or disposition.

§ Arizona, § 2742. Judges of the district courts may, either in term time or vacation, grant writs of injunction, returnable to said courts, in the following cases:

1. Where it shall appear that the party applying for such writ is entitled to the relief demanded, and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

2. Where, pending litigation, it shall be made to appear that a party is doing some act respecting the subject of litigation, or threatens, or is about to do some act, or is procuring or suffering the same to be done in violation of the rights of the applicant, which act would tend to render the judgment ineffectual.

3. In all other cases where the applicant for such writ may show himself entitled thereto under the principles of equity.

° Arkansas, § 3965. Where it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance

of some act which could produce great or irreparable injury to the plaintiff, or where, during the litigation, it appears that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act, in violation of the plaintiff's rights, respecting the subject of the action and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. It may also be granted in any case where it is specially authorized by statute.

† Colorado, C. C. P. § 159. An injunction may be granted in the following cases:

First—When it shall appear by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or some part thereof, consists in restraining the commission or continuance of the act complained of, during the pendency of the litigation, or for a limited period, or perpetually.

Second—When it shall appear by the complaint or affidavit that the commission or continuance of some act would produce great or irreparable injury during the litigation.

Third—When it shall appear at any time in any character of an action during the litigation, by affidavit or otherwise, that the defendant is doing, or threatens, or is about to do, some act, or is procuring, or suffering to be done, some act in violation of the plaintiff's rights respecting the subject-matter of the action, and tending to render the judgment ineffectual, and in such other cases as courts of equity have heretofore granted relief by injunction, or which may be specifically provided for in this act; provided, that no writ of injunction shall issue to restrain the passage of penal ordinances or the enforcement thereof.

° Idaho, § 4288. An injunction may be granted in the following cases:

1. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief or any part thereof, consists in restraining the commission or continuance of the act complained of, either for a limited period or perpetually;

2. When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, great or irreparable injury to the plaintiff;

3. When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual;

4. When it appears, by affidavit, that the defendant during the pendency of the action threatens, or is about to remove, or to dispose of his property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition;

5. An injunction may also be granted on the motion of the defendant upon filing a cross-complaint, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff;

6. The district courts or any judge thereof sitting in chambers, in addition to the powers already possessed, shall have the power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which he or they may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which he or they are kept out of possession by threats whenever such possession was taken from him or them by entry of the adverse party on Sunday or a legal holiday, or in the night-time, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such

writ had issued; provided, that no such writ shall issue except upon notice in writing to the adverse party of at least five days of the time and place of making application therefor.

Iowa, § 4354. An injunction may be obtained as an independent remedy in an action by equitable proceedings, in all cases where such relief would have been granted in equity previous to the adoption of the code; and in all cases of breach of contract or other injury, where the party injured is entitled to maintain and has brought an action by ordinary proceedings, he may, in the same cause, pray and have a writ of injunction against the repetition or continuance of such breach of contract or other injury, or the commission of any breach of contract or injury of like kind arising out of the same contract or relating to the same property or right, and he may also, in the same action, include a claim for damages or other redress.

Kansas, § 5133. When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief or any part thereof consists in restraining the commission or continuance of some act, the commission or continuance of which during the litigation would produce injury to the plaintiff; or when during the litigation it appears that the defendant is doing or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act. And when during the pendency of an action it shall appear by affidavit that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, or to render the judgment ineffectual, a temporary injunction may be granted to restrain such removal or disposition. It may also be granted in any case where it is specially authorized by statute. (Re-enacted, Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 250.)

Minnesota, § 4259. When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief consists wholly or partly in restraining the commission or continuance of some act which, if permitted during the litigation, would work injury to the

plaintiff, or when during the litigation it appears that the defendant is about to do, or is doing, or threatening, procuring, or suffering to be done, some act in violation of plaintiff's rights respecting the subject of the action, and tending to make the judgment ineffectual, a temporary injunction may be granted to restrain such act. And where, during the pendency of an action, it appears by affidavit that the defendant threatens or is about to remove or dispose of his property, with intent to defraud his creditors, a temporary injunction may be granted to restrain such removal or disposition.

i Missouri, § 3630. When it shall appear by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act of the defendant, the commission or continuance of which, during the litigation, would produce injury to the plaintiff, or when, during the litigation, it shall appear that the defendant is doing, or threatens, or is about to do some act in relation to the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, a temporary injunction may be granted to restrain such act.

j Montana, § 6643, substantially same as Idaho § 4288, down to include first 4 subs., except in sub. 2, after "produce" in fourth line omit "waste;" and omit subs. 5 and 6 of Idaho statute.

k Nebraska, § 6801, substantially same as Kansas § 5133, except near the end of the first clause after "produce" insert "great or irreparable" before "injury." Also omit entirely the second sentence of the Kansas statute.

l Nevada, § 3207, substantially same as Idaho § 4288, to include the first 3 subs., except omit "waste" after "produce" near end of sub. 2, and omit entirely subs. 4, 5 and 6 of the Idaho statute.

m North Dakota, § 6930, substantially same as Kansas § 5133, except in the next to the last sentence, after "creditors" omit the clause "or to render the judgment ineffectual"; also omit entirely the last sentence of the Kansas statute.

n Oklahoma, § 4425, same as Kansas § 5133.

o Oregon, § 420, same as Alaska C. C. P. § 386.

p South Dakota, C. C. P. § 197, same as North Dakota § 6930. (Re-enacted Feb. 26, 1907, Sess. Laws 1907, pp. 165, 185.)

q Texas, Art. 2989. Judges of the district and county courts shall, either in term time or vacation, hear and determine all applications and may grant writs of injunctions returnable to said courts in the following cases:

(1) Where it shall appear that the party applying for such writ is entitled to the relief demanded and such relief or any part thereof requires the restraint of some act prejudicial to the applicant.

(2) Where, pending litigation, it shall be made to appear that a party [is] doing some act respecting the subject of litigation, or threatens, or is about to do some act, or its [is] procuring or suffering the same to be done in violation of the rights of the applicant which act would tend to render judgment ineffectual.

(3) In all cases where the applicant for such writ may show himself entitled thereto under the principles of equity, and as provided by statutes in all other acts of this state providing for the granting of injunctions, or where a cloud would be put on the title of real estate being sold under an execution against a person, partnership or corporation, having no interest in such real estate subject to the execution at the time of the sale, or irreparable injury to real estate or personal property is threatened, irrespective of any legal remedy at law.

Provided, that no district judge shall have the power to grant any writ of injunction returnable to any other court than his own, unless the application or petition therefor shall state that the resident judge, that is, the judge in whose district the suit is, or is to be brought, is absent from his district, or is sick and unable to hear or act upon the application, or is inaccessible, or unless such resident judge shall have refused to hear or act upon such application for the writ of injunction, or unless such judge is disqualified to hear or act upon the application; and the facts of, and relating to, such judge's absence, or sickness and inability, or disqualification, or inaccessibility, or refusal to act must be fully set out in the application for the writ, or in an affi-

davit accompanying said application; and in case of such absence, or sickness and inability or inaccessibility, or disqualification, of the resident judge, or in case of his refusal to hear, or act upon, such application, no district judge shall have the power to grant the writ when the application therefor shall have once been acted upon by a district judge of the state; provided, that when the judge applied to shall have refused to hear or act upon such application, he shall endorse thereon, or annex thereto, his refusal to hear or act upon such application, together with his reason therefor; provided, that nothing herein shall apply to the granting of writs of injunction by non-resident judges to stay execution or to restrain foreclosures, or to restrain sales under deeds of trust, or to restrain trespasses, or to restrain the removal of property, or to restrain acts injurious to, or impairing riparian or easement rights where proof is made to the satisfaction of such non-resident judge that it is impracticable for the applicant to reach the resident judge and procure his action in time to effectuate the purpose of the application.

A resident judge shall be deemed inaccessible, within the meaning of this act, when by the ordinary and available means and modes of travel and communication, he cannot be reached in sufficient time to effectuate the purpose of the writ of injunction sought.

Whenever an application or petition for the writ of injunction shall be made to a non-resident judge upon the ground that the resident judge is inaccessible as hereinbefore defined, the party making such application or his attorney, shall make and file with the application, as a part thereof or annexed thereto, an affidavit setting out fully the facts showing that the resident judge is inaccessible, and the efforts made by the applicant to reach and communicate with said resident judge, and the result of said efforts in that behalf, and unless it appears from said affidavit that the applicant has made a fair and reasonable effort to procure the action of the resident judge upon said application, [no] non-resident judge shall have the power to hear said application upon the ground of inaccessibility of the resident judge; and should any non-resident judge hear said application upon said ground of inaccessibility of the

resident judge, and should grant the writ of injunction prayed for, said injunction so granted shall be dissolved upon its being shown that the petitioner has not first made a reasonable effort to procure a hearing upon said application before the resident judge. (Amended Apr. 22, 1909; General Laws 1909, p. 354.)

1 Utah, § 3058, substantially same as Idaho § 4288, down to include first 3 subs., except in sub. 2 omit "waste" after "produce" in fourth line; also omit subs. 4, 5 and 6 of Idaho statute and for sub. 4 insert the following:

4. An injunction may also be granted on the motion of the defendant, upon filing an answer praying for affirmative relief upon any of the grounds mentioned in this section, subject to the rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

2 Washington, § 719. When it appears by the complaint that the plaintiff is entitled to the relief demanded and the relief, or any part thereof, consists in restraining the commission or continuance of some act the commission or continuance of which during the litigation would produce great injury to the plaintiff; or when, during the litigation, it appears that the defendant is doing, or threatened [threatens], or is about to do, or is procuring, or is suffering some act to be done, in violation of the plaintiff's rights respecting the subject of the action, tending to render the judgment ineffectual; or where such relief, or any part thereof, consists in restraining proceedings upon any final order or judgment, an injunction may be granted to restrain such act or proceedings until the further order of the court, which may afterwards be dissolved or modified upon motion. And where it appears, in the complaint, at the commencement of the action, or during the pendency thereof, by affidavit, that the defendant threatens or is about to remove or dispose of his property with intent to defraud his creditors, a temporary injunction may be granted to restrain the removal or disposition of his property.

31 Wisconsin, § 2774, substantially same as North Dakota § 6930.

32 Wisconsin, § 2775. A temporary injunction may also be granted on the ap-

plication of the defendant, when it shall appear that the plaintiff is doing, or threatens, or is about to do, or is procuring or suffering to be done some act in violation of the defendant's rights respecting the subject of the action and tending to his injury or to render ineffectual such judgment as may be rendered in his favor.

u Wyoming, § 4039. When it appears by the petition that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of some act, the commis-

sion or continuance of which, during the litigation would produce great or irreparable injury to the plaintiff, or when, during the litigation, it appears that the defendant is doing, or threatens or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual, a temporary order may be granted restraining such act; and such order may also be granted in any case where it is specially authorized by statute.

§ 425. COMPLAINTS [OR PETITIONS].

FORM No. 1009—For injunction against waste.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the plaintiff is the owner in fee-simple of the premises [describing them].

2. That the defendant is in possession of said premises, under a lease from the plaintiff, a copy of which is hereto annexed, and made part hereof.

3. That on the day of , 19 , and on divers other days between that time and the commencement of this suit, the defendant wrongfully [cut down and carried away fruit trees, and tore down and destroyed a certain building constituting part of said realty], and otherwise suffered and committed great waste on the premises, in violation of the terms of said lease, and without the consent of the plaintiff.

4. That the defendant is about to and will, unless restrained by this court, commit further waste, in this [state what he threatens to do].

Wherefore, the plaintiff prays judgment: That the defendant be restrained by injunction from committing or permitting any further waste on the said premises, and that an account of the damage done may be taken and judgment therefor be awarded; and for such other relief as is equitable.

[Concluding part.]

FORM No. 1010—To restrain negotiation of note.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff made his promissory note in writing, of which the following is a copy: [Copy note]; which note was made and delivered by the plaintiff to L. M. without consideration and for his accommodation, and with the special understanding and agreement between the plaintiff and said L. M. that [state intended application].

2. That said note was thereafter offered by said L. M. to the Bank of , which refused to discount the same, and returned it to the said L. M., whereupon the plaintiff became entitled to the possession thereof. [Or state the facts as they occurred.]

3. That the defendant still retains said note in his possession, and though on the day of , 19 , the plaintiff requested him to deliver it up, he then refused, and has ever since refused, and now refuses, so to do.

Wherefore, the plaintiff prays judgment: That the defendant be enjoined from negotiating, transferring, or enforcing said note; that it be given up and canceled; and for the costs of this action.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 1011—To restrain threatened injury to an invaluable chattel.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That he now is, and at the times hereinafter mentioned was, the owner of [here describe the chattel].

2. That on the day of , 19 , he deposited said [chattel] for safe-keeping with the defendant, and on the day of , 19 , demanded the same from the defendant, offering to pay all reasonable charges for its storage.

3. That the defendant refuses to deliver the same to the plaintiff, and threatens to conceal, dispose of, or injure the same, if required to deliver it up.

4. That no pecuniary damages would be an adequate compensation to the plaintiff for the loss of the said [chattel].

Wherefore, the plaintiff prays judgment that the defendant be restrained by injunction from disposing of, injuring, or concealing the said [chattel].

[Etc.]

FORM No. 1012—To enjoin obstruction maintained by a railroad corporation along a public highway.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That the defendant during the times hereinafter mentioned was, and it now is, a corporation organized under the laws of the state of .

2. That plaintiff was on the day of , 19 , and ever since has been, the owner and in possession of the following-described lot, in the city of , county of , state of : [Here describe]; that the said lot fronts on Street, a public highway in said city, which street, before the grievances hereinafter complained of, afforded unobstructed means of ingress to and egress from said lot.

3. That on the day of , 19 , the defendant, without any right whatever, constructed or caused to be placed upon and along said Street, and in front of said lot of plaintiff, embankments, excavations, railroad tracks, and other obstructions to the free and necessary use of said street, and maintained, and ever since maintains and operates, over and upon the entire length of said street, and has continuously ever since the date aforesaid maintained upon and along said public highway said embankments, excavations, railroad tracks, and all other of said obstructions, and has run and still runs its locomotives and trains of cars over and upon said tracks, and thereby interferes materially with the right of plaintiff to the ingress to and egress from his said lot over, along, and upon said street; that defendant has by its acts aforesaid, diminished the value of plaintiff's lot in the sum of \$, to plaintiff's damage in the sum of \$.

Wherefore, plaintiff prays judgment against defendant for the sum of \$, and plaintiff's costs of this action; that said obstructions and all thereof be abated; and that the defendant be enjoined from further maintaining the same, or any obstructions, upon or along said street.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 1013—To enjoin claimants from asserting or claiming, except in this action, under certain alleged mechanics' liens.

(In Hoffman-Marks Co. v. Spires, 154 Cal. 111; 97 Pac. 152.)

[Title of court and cause.]

Plaintiff complains of defendants, and alleges:

1. That the following-named defendants are, and at all the times herein mentioned were, partnerships, to wit: [Here follow names of defendants alleged to be partnerships.]

2. That the following-named defendants are, and at all times herein mentioned were, corporations duly organized and existing under the laws of the state of California, to wit: [Here follow names of defendants alleged to be corporations.]

3. That on or about the 6th day of September, 1904, the defendant McKown & Co. agreed and entered into a contract with plaintiff to build and to furnish the material and labor necessary to build a house for her for residence purposes, on lots [here described], for the contract price or sum of \$8,183; that plaintiff was on September 6, 1904, ever since has been, and now is, the owner in fee, and as her separate property, of said lots.

4, 5. [Here follow averments as to the terms of said contract; as to work done, labor and materials furnished thereunder, and payments made thereon; as to abandonment of the contract by the defendant contractors before completion of the building, and completion of the work by the plaintiff under other contracts thereupon made.] * * * That, in addition to the \$3,682.35 paid to said McKown & Co. as aforesaid, plaintiff was obliged to and did pay for the material and labor actually and necessarily used in completing said house, as above alleged, the further sum of \$7,581.79, or \$3,081.14 more than the whole contract price thereof, and said \$7,581.79 was the fair and reasonable cost and expenses of the completion of said house; that on said 29th day of September, 1904, the value of the work and materials already done and furnished, including materials delivered or on the ground, estimated as near as may be by the standard of the whole contract price, was less than the sum of said three payments, aggregating the sum of \$3,682.35.

6. That each and every of the defendants herein other than said McKown & Co. claim, or are assignees of persons who claim, to have furnished materials or labor, or both, to be used, and which they assert actually were used, by said firm in the construction of said

house prior to its abandonment of the building thereof, and claim that the said firm of McKown & Co. is indebted to them for and on account thereof, and are asserting that they have, or are entitled to have, liens upon said house and lots for the value of the same; but plaintiff is unable to state whether the demands of all or any of said parties are just, or are the precise amounts due to them respectively from said McKown & Co. on account of such labor and materials. Some of said defendants have served written notice on plaintiff that said firm of McKown & Co. was indebted to them for work or labor done in performance of said contract, and have notified plaintiff to withhold moneys sufficient to pay their demands, and other defendants have filed notice with the recorder of such Los Angeles County, claiming liens on said property under part III, title IV, chapter II, of the Code of Civil Procedure, and still others of them are threatening to do so; and plaintiff alleges that unless restrained, defendants will bring separate actions against her to assert their said claims, and she will be harassed and put to great and needless expense in defending said actions.

Wherefore, plaintiff prays: That each and every of the defendants herein be perpetually enjoined from filing or in any way asserting claims or liens of any kind against said property or any part thereof, except in this action; that those of them who have already commenced separate actions against plaintiff be enjoined from making any further efforts towards enforcing said claims in said actions; that the same be declared without foundation; that it be adjudged that plaintiff is not indebted to said McKown & Co. on account of said contract or at all, and that there is no fund in plaintiff's hands for the payment of laborers or materialmen; and for costs and all other proper relief.

John D. Pope, and
Charles Wellborn,
Attorneys for plaintiff.

[Verification.]

§ 426. ORDERS, DECREES, ETC.

FORM No. 1014—Order to show cause, and interlocutory injunction.

(In *More v. Calkins*, 85 Cal. 177; 24 Pac. 729.)

[Title of court and cause.]

The plaintiff in the above-entitled cause, having commenced an action in the superior court of the county of Ventura, state of Cali-

fornia, against the defendant, and having prayed for an injunction against the defendant, requiring him to refrain from certain acts in said complaint and hereinafter more particularly mentioned:

Now, on reading the complaint in said action, duly verified by the oath of the plaintiff, and it satisfactorily appearing to me therefrom that there are sufficient grounds for granting an order to show cause why an injunction should not be granted;

It is therefore ordered, that the defendant, J. W. Calkins, appear before me at the courthouse in San Buena Ventura, on Wednesday, the 24th day of the present month, at 11 o'clock A. M. of that day, to show cause, if any he has, why he should not be perpetually enjoined and restrained from selling at public auction or private sale, or in any manner disposing of the said several tracts of land described in the said complaint, or any or either of them, or the water-rights appurtenant thereto;

It is further ordered, that the defendant, J. W. Calkins, his servants, agents, solicitors, attorneys, and all others acting in aid or assistance of the defendant, do absolutely desist and refrain from selling the said tracts of land in said complaint described, and the water-rights appurtenant to the said tracts, or any or either of said tracts or water-rights, at public or private sale, or in any manner disposing of the said tracts and water-rights, or either of them, until the further order of the court herein.

Done this 10th day of April, 1889.

B. T. Williams, Judge.

FORM No. 1015—Temporary Injunction pendente lite, conditioned on giving of bond by the plaintiff.

(In *Severns v. English* (Okla.), 101 Pac. 750, 751.)

[Title of court and cause.]

The above-entitled cause comes on to be heard before the undersigned, judge of the district court in and for the aforesaid county and territory, at my chambers at Hobart, Oklahoma, on motion and affidavit of the plaintiff as receiver, for an order directing, commanding, and ordering J. O. Severns, defendant, to deliver and turn over to F. M. English, receiver, one certain Buckeye ditcher, now being used and operated by said defendant in excavating the trenches for the Lawton sewer system, in the city of Lawton, Comanche County, Oklahoma; and further praying that said J. O. Severns, his agents,

servants, and employees, be restrained from further using, managing, or operating the aforesaid Buckeye ditcher:

It is therefore by the court, after being duly advised in the premises, ordered, adjudged, and decreed, that the said J. O. Severns do forthwith deliver and turn over to the said F. M. English, receiver, the aforesaid Buckeye ditcher, now being used, operated, and controlled by said Severns, his agents, servants, and employees, and he is hereby directed and ordered by the court to deliver the aforesaid Buckeye ditcher to the aforesaid F. M. English, receiver.

It is further ordered, adjudged, and directed by the court, that the said J. O. Severns, his agents, employees, and all persons acting for him during the pendency of this action, be and they are each and all of them hereby restrained from any and all further use and management of the said Buckeye ditcher; this order and injunction to be and remain in full force and effect from the time of its signing until such time as J. O. Severns shall make, execute, and deliver to George W. Broe a good and sufficient bond in the sum of \$5,000, the same to be approved by the clerk of the district court of Comanche County, Oklahoma, and conditioned and in compliance with a certain order made by this court in the case of George W. Broe, plaintiff, versus J. R. Hale, defendant, pending in the district court of Comanche County, Oklahoma, wherein this plaintiff, F. M. English, was appointed as a receiver to take charge of and control and manage the aforesaid Buckeye ditcher under the direction and control of the court. Said bond shall be conditioned to pay the judgment rendered in favor of George W. Broe versus John R. Hale as aforesaid, in the aforesaid cause. The order of injunction herein to be in force only after giving a good and sufficient bond in the sum of \$2,500 by plaintiff to defendant, conditioned that plaintiff will pay defendant any damages sustained if it be finally determined that the order of injunction herein is wrongfully granted.

Done at Hobart, Kiowa County, Oklahoma, on this 12th day of April, 1905.

F. E. Gillette,
Judge of the District Court.

[Endorsed:] Filed April 12, 1905.

N. E. Sisson, Clerk.
By L. S. Eckles, Deputy.

FORM No. 1016—Injunction pendente lite to restrain continuance of trespass.
 (In Rohrer v. Babcock, 114 Cal. 124; 45 Pac. 1054; 126 Cal. 222; 58 Pac. 537.)¹

[Title of court and cause.]

The people of the state of California to A. L. Babcock, greeting:

The plaintiff having filed her complaint in the superior court of the county of Siskiyou against the defendant, praying for an injunction against the defendant, requiring him to refrain from certain acts in said complaint and hereinafter more particularly mentioned. On reading the said complaint in this action, duly verified, and it satisfactorily appearing to the said court therefrom that it is a proper case for an injunction, and that sufficient grounds exist therefor, and the necessary and proper undertaking having been given:

We, therefore, in consideration thereof, and of the particular matters of the said complaint set forth, do strictly command you, and each and all of you, that until the further order of said court you and each of you, your and each of your servants, agents, attorneys, employees, and all persons acting under the control, authority, or direction of you or either of you, do absolutely refrain from and desist from removing or molesting pending judgment in this action any of the hay contained in those two certain haystacks stacked near the center of the lower stockyards of the "Home Ranch" of John B. Rohrer, deceased, in said county and state, containing about fifty tons of hay, and being those two stacks of hay which were set apart as plaintiff's portion of the hay raised on the said "Home Ranch" during the year 1895.

Witness the Hon. J. S. Beard, judge of the superior court at Yreka, in the county of Siskiyou, and the seal of the said court, this 5th day of December, 1895.

[Seal.]

Allen Newton, Clerk.

FORM No. 1017—Undertaking on Injunction.

[Title of court and cause.]

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the superior court of the county of _____, state of _____, against the above-named defendant, and he is about to apply for an injunction in said action against the defendant,

¹ For the complaint in this action, see ch. LXXI, form No. 521.

enjoining and restraining the defendant from the commission of certain acts, as in the complaint filed in the said action are more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the county of _____ in consideration of the premises, and of the issuing of said injunction, do jointly and severally undertake in the sum of \$ _____, and promise to the effect that in case said injunction shall issue the plaintiff will pay to the said party enjoined such damages, not exceeding the sum of \$ _____, as such party may sustain by reason of the injunction, if the said superior court shall finally decide that the plaintiff was not entitled thereto.

Dated this _____ day of _____, 19 ____.

[Signature of surety.] [Seal.]

[Signature of surety.] [Seal.]

[Justification of sureties as in ch. CXXIV, form No. 1028, and filing endorsement.]

FORM No. 1018—Order granting motion dissolving injunction.

(In Long v. Newman, 10 Cal. App. 430; 102 Pac. 534.)

[Title of court and cause.]

Present, J. M. Seawell, Judge, and officers of the court:

In this cause the motion of the defendant for an order to dissolve the temporary injunction issued herein came on regularly this day to be heard: Whereupon, after argument by counsel for the respective parties herein, it is ordered, that said motion be and the same is hereby granted [and said injunction is hereby dissolved].

[Date.]

[Signature of clerk.]

FORM No. 1019—Order dissolving or modifying injunction.

[Title of court and cause.]

It appearing to the court, upon due notice given to the plaintiff of a motion to dissolve [or to modify] the injunction heretofore granted in this action, that there is not legal or sufficient ground for said injunction [or that said injunction should be modified], for the following reasons, to wit: [Here state the same briefly.]

*It is therefore ordered, that said injunction be and the same is hereby dissolved.

[In case of motion to modify, beginning with the star (*), conclude as follows: "It is ordered, that said injunction be and the same is hereby modified" (stating in what respect the same is modified).]

[Date.]

S. T., Judge.

FORM No. 1020—Judgment for defendant dissolving temporary injunction, etc., in action to restrain a church society from converting church property, misdirecting its use, etc.

(In Cumberland Permanent Committee of Missions v. Pacific Synod of Presbyterian Church (Cal.), 106 Pac. 395.)

[Title of court and cause.]

This cause came on regularly for trial, upon notice duly given, before department two of the above-entitled court, Hon. M. H. Hyland presiding, without a jury, a jury trial having been expressly waived by all parties, the plaintiff being represented by its attorneys, Thomas E. Clark and H. L. Partridge, and the defendants being represented by their attorneys, W. N. Rutherford, W. A. Beasley, and H. Ray Fry, and oral and documentary evidence having been introduced by all the parties, and the cause having been argued and submitted for decision on briefs filed by all the parties hereto, and the court being fully advised in the premises, and having filed its findings of fact and conclusions of law; now, therefore, in accordance with said findings and conclusions, it is hereby

Ordered, adjudged, and decreed, that plaintiff take nothing by reason of its said complaint, and that defendants have judgment against the plaintiff dissolving the restraining order or temporary injunction heretofore issued in this action, and for their costs.

Dated October 11, 1907.

M. H. Hyland,
Judge of the Superior Court.

For count in complaint for damages joined with count praying for injunction to restrain unlawful diversion of the waters of a river, see ch. LXXXII, form No. 592.

For allegation as to acts of defendant causing irreparable damage and injury to the plaintiff, see ch. LXXXII, paragraph 22, form No. 592.

Form of petition for an injunction against the defendants seeking to restrain the enforcement of a judgment: *Little v. Evans*, 41 Kan. 578, 21 Pac. 630.

Form of petition in an action to enjoin defendant from using materials injurious to plaintiff's crops, and for damages: *Fogarty v. Junction City Pressed Brick Co.*, 50 Kan. 482, 31 Pac. 1052, 18 L. R. A. 756.

Form of petition in an action in equity to enjoin and restrain defendant from changing the grade of streets and an alley, in pursuance of its ordinances, until the

damage sustained by plaintiff to its property by reason thereof is adjusted: *Mac-Murray-Judge Architectural Iron Co. v. City of St. Louis*, 138 Mo. 608, 39 S. W. 467.

Form of petition in an action to restrain the sale of property for alleged illegal taxes upon personal property: *Bartlett v. Atchison, T. & S. F. R. Co.*, 32 Kan. 134, 4 Pac. 178.

Form of petition for an injunction, and for damages against defendant for digging up trees, injuring buildings, etc., on plaintiff's premises: *Johns v. Schmidt*, 32 Kan. 383, 4 Pac. 872.

Form of petition filed by an attorney-general seeking an injunction restraining the unlawful sale of liquor: *Koester v. State*, 36 Kan. 27, 12 Pac. 339.

Form of complaint in an action by the owner of a sawmill to abate obstructions in a stream which delay its logs in floating down the stream, and for damages: *The A. C. Conn Co. v. Little Suamico Lumber etc. Co.*, 55 Wis. 580, 13 N. W. 464.

Form of complaint for an injunction to restrain or prevent the flooding of plaintiff's property by water from defendant's reservoir: *Sylvester v. Jerome*, 19 Colo. 128, 34 Pac. 760.

Form of complaint for an injunction by a corporation plaintiff, in aid of the preservation of certain personal property upon which plaintiff holds a chattel mortgage: *Bank of Ukiah v. Moore*, 106 Cal. 673, 39 Pac. 1071.

Form of complaint for an injunction to restrain the husband from interfering with the wife's separate property: *Woffenden v. Woffenden*, 1 Ariz. 328, 331, 25 Pac. 666.

For substance of complaint in an action to enjoin maintenance of a dam which, by reason of overflows, etc., causes injury to the plaintiff, and for damages, etc., see *Wilhite v. Billings etc. Co.*, 39 Mont. 1, 101 Pac. 168.

Form of demurrer in a proceeding for an injunction to prevent the sale of a homestead: *Pierson v. Truax*, 15 Colo. 224, 25 Pac. 183, 184.

Form of answer in an action in equity to enjoin the directors of a levee district from proceeding under chapter 101 of the Revised Statutes (Mo.) to construct a levee in said district: *Morrison v. Morey*, 146 Mo. 553, 48 S. W. 629, 631.

Form of undertaking on injunction in an action upon an injunction bond: *Sherman v. County Commissioners*, 9 Colo. App. 155, 47 Pac. 973.

Form of decree in an action to enjoin maintenance of dam: *Paragoonah Field etc. Co. v. Edwards*, 9 Utah 477, 35 Pac. 487, 488.

For the substance of forms in a proceeding to restrain a resident of the state of Colorado from prosecuting a personal action instituted by him in the courts of another state against a citizen of his own state, but at all times residing in Colorado, and where the matters attempted to be litigated have theretofore been adjudicated and settled in and by the courts of Colorado, see *O'Haire v. Burns*, 45 Colo. 432, 101 Pac. 755, 132 Am. St. Rep. 191, 25 L. R. A. (N. S.) 267.

Action to enjoin defendant city from enforcing certain ordinances which prohibit the use of sidewalk space in the city for the sale of fruits, books, or other merchandise, and the erection or maintenance upon such sidewalks of any booth, shed, stand, or other construction. Case submitted upon stipulation of facts set out at length in the decision: *Chapman v. City of Lincoln*, 84 Neb. 534, 121 N. W. 596-599.

§ 427. ANNOTATIONS.—Injunction.

1. Nature of remedy.

2, 3. Rights protected by statute not abridged.

4, 5. "Plain, speedy, and adequate remedy at law" precludes injunction.

6. Where the remedy is by action of ejectment.

7-9. Remedy as against party not a trespasser.

10. When injunction will not lie.—Absence of substantial injury.

Jury's Pl.—106.

11. Rival claimants to public office.
12. Mandatory injunctions not favored.
13. Restraining order in equity should be definite and certain.
14. Petition for injunction, when sufficient.
- 15-17. Discretion of court.—Granting a temporary injunction pendente lite.
18. California rule.
19. Dissolving temporary injunction.—Rule.
20. Exception to the rule.
21. Motion to dissolve injunction.
22. Dissolving injunction upon appeal.
23. Decision on merits not permitted on motion to dissolve.
24. Temporary writ of injunction improvidently issued.

1. **Nature of remedy.**—An injunction is an extraordinary remedy, and does not follow as of right, even when a case of wrongful act is made out on one side and consequent injury on the other. The court will always consider whether it will not do a greater injury by enjoining an act than would result from permitting the act to continue and leaving the party injured to his remedy in damages at the hands of a jury: *Ferry-Leary L. Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445, 446.

2. **Rights protected by statute not abridged.**—Courts of equity do not have jurisdiction to abridge rights which are specially protected under the statute, nor to ignore the limitations imposed upon the exercise of such remedies. It has therefore been held that the plaintiff should not be granted an injunction in equity where this remedy, if effected, would deprive the defendant of his possession without the statutory notice guaranteed him under the statute: *Hall v. Henninger (Iowa)*, 121 N. W. 6, 8.

3. **Equity will not interfere by injunction, unless the threatened wrong is substantial and irreparable in damages:** *Tift v. State Medical Inst.*, 53 Wash. 365, 101 Pac. 1081, 1082.

4. **"Plain, speedy, and adequate remedy at law" precludes injunction.**—It is a rule in equity peculiarly applicable to actions in which injunctions are sought that such relief will not be granted where there is a plain, speedy, and adequate remedy at law: *Hall v. Henninger (Iowa)*, 121 N. W. 6, 8; *Forbes v. Carl*, 125 Iowa 317, 101 N. W. 100; *Home S. & T. Co. v. Hicks*, 116 Iowa 114, 89 N. W. 103; *Ewing v. Webster City*, 103 Iowa 226, 72 N. W. 511; *Waterloo v. Waterloo St. R. Co.*, 71 Iowa 193, 32 N. W. 329.

5. Under the Iowa statute, it is well

settled that where the relief asked is such relief as equity only can grant, the plaintiff's action will be dismissed if the facts are not such as to entitle him to that relief, although he might have a remedy in a proper action at law: *Hall v. Henninger (Iowa)*, 121 N. W. 6, 10; *Cooper v. Cedar Rapids*, 112 Iowa 367, 83 N. W. 1050; *Kelly v. Andrews*, 94 Iowa 484, 62 N. W. 853; *Hartwig v. Hes*, 131 Iowa 501, 109 N. W. 18.

6. **Where the remedy is by action of ejectment, it is not the province of a court of equity, by decree in a proceeding for an injunction to attempt to disturb the possession of defendants where such possession is actual, open, and notorious, and had been such for a long time prior to the commencement of the proceedings in equity:** *Waddingham v. Robledo*, 6 N. Mex. 347, 28 Pac. 663, 672.

7. **Remedy as against party not a trespasser.**—Where the defendant is not a trespasser, but is in the actual and continued possession of the real property in controversy, plaintiff misconceives his remedy where he applies for an injunction. In such a case the plaintiff should bring an action at law to recover possession: *Hall v. Henninger (Iowa)*, 121 N. W. 6, 10, (Weaver, J., and Evans, C. J., dissenting, and holding that the facts in this case disclosed that defendant was a trespasser and that a decree for a permanent injunction should stand).

8. **Injunction lies to restrain a board of supervisors from passing ordinances working an irreparable injury:** *Spring Valley Water Works v. Bartlett*, 16 Fed. 615, 8 Sawy. 555.

9. **Injunction will be granted at suit of stockholder to restrain unauthorized action of exchange where the same is**

prejudicial to his rights as a stockholder: *Kolff v. St. Paul Fuel Ex.*, 48 Minn. 215, 50 N. W. 1036.

10. When injunction will not lie.—Absence of substantial injury.—Injunction will not lie at the instance of one board of trade against another to restrain the unlawful exercise of power where former has suffered no particular and substantial injury: *Jones v. Board of Trade*, 52 Kan. 95, 34 Pac. 453.

11. Rival claimants to public office.—Injunction is not the proper remedy to determine the rights of rival claimants to the possession of a public elective office: *Hotchkiss v. Keck*, 84 Neb. 545, 121 N. W. 579, 580.

12. While mandatory injunctions are not favored by the courts, they are nevertheless permissible in certain special cases: *Magpie G. M. Co. v. Sherman* (S. Dak.), 121 N. W. 770, 773, (remedy held permissible in this action to restrain the defendant as managing agent of the corporation from doing certain wrongful acts and things complained of during the pendency of proceedings for an accounting for moneys alleged to have been misapplied, or fraudulently squandered or disposed of, or converted to the defendant's own use).

13. The restraining order in equity should be definite and certain in its terms, and should point out to the defendants with reasonable certainty the specific acts which they are required to refrain from doing: *Waddingham v. Robledo*, 6 N. Mex. 347, 28 Pac. 663, 673.

14. A petition for injunction to be sufficient, must state facts which show that the plaintiff has no adequate remedy at law; and if the injunction be denied, that he will suffer irreparable injury. A petition which merely pleads the bald conclusions is insufficient. The formal allegations in the words of the statute are properly used only when pleaded in connection with facts which taken as true would constitute annoyance, inconvenience, or irreparable injury: *McKeever v. Buker*, 80 Kan. 201, 101 Pac. 991.

15. Discretion of court.—Granting a temporary injunction pendente lite is largely within the discretion of the court, and the appellate court will not vacate such an order on appeal unless there has been a clear abuse of discretion, or

unless the same was granted without authority: *Severns v. English* (Okla.), 101 Pac. 750, 754, citing *Reaves v. Oliver*, 3 Okla. 62, 41 Pac. 353.

16. The matter of granting or continuing a temporary writ of injunction rests largely in the sound discretion of the trial court: *Walker v. Stone*, 70 Iowa 103, 30 N. W. 39; *Swan v. City of Indianola*, 142 Iowa 731, 121 N. W. 547, 549.

17. Discretion is a legal one.—The discretion exercised by a court in granting or continuing a temporary writ of injunction is a legal one, and, if not based upon sufficient grounds, will be reversed on appeal: *Swan v. City of Indianola*, 142 Iowa 731, 121 N. W. 547, 549; *Sinnett v. Moles*, 38 Iowa 25; *Stewart v. Johnston*, 44 Iowa 435; *Fuson v. Connecticut I. Co.*, 53 Iowa 609, 6 N. W. 7.

18. California rule.—It is a settled rule in California that an order granting or dissolving an injunction is a matter of discretion with the lower court, and that such discretion will not be interfered with by a reviewing court unless it clearly appears that such discretion has been abused: *Long v. Newman*, 10 Cal. App. 430, 102 Pac. 534, 538.

19. Dissolving temporary injunction.—Rule.—The general rule as to a temporary injunction is that where all the material allegations of the petition for an injunction are fully and satisfactorily denied in the answer, the preliminary injunction will be dissolved: *Swan v. City of Indianola*, 142 Iowa 731, 121 N. W. 547, 549; *Walker v. Stone*, 70 Iowa 103, 30 N. W. 39; *Carrothers v. Newton Co.*, 61 Iowa 681, 17 N. W. 43; *Russell v. Wilson*, 37 Iowa 337.

20. An exception to the rule is made where fraud is the gravamen of the action, or it is apparent that by a dissolution of the injunction the party will lose all benefit to accrue from final success in his suit: *Johnston v. Railroad*, 58 Iowa 537, 12 N. W. 576; *Fargo v. Ames*, 45 Iowa 494; *Stewart v. Johnston*, 44 Iowa 435; *Wingert v. City of Tipton*, 134 Iowa 97, 108 N. W. 1035, 111 N. W. 432; *Sinnett v. Moles*, 38 Iowa 25.

21. A motion to dissolve an injunction is properly granted where the only allegations of the complaint in the suit are made on information and belief, and these averments are positively contra-

dicted by certain affidavits filed on the motion to dissolve, and where the complaint is not supported by counter-affidavits: *Carstens v. City of Fond du Lac*, 137 Wis. 465, 119 N. W. 117, 121, citing *Dinehart v. Town of Lafayette*, 19 Wis. 677; *Schoeffler v. Schwarting*, 17 Wis. 30; *Smith v. Appleton*, 19 Wis. 468; *Tainter v. Lucas*, 29 Wis. 375; *Pittelkow v. Herman*, 94 Wis. 666, 69 N. W. 805.

22. Dissolving Injunction upon appeal.—If upon the entire record nothing but questions of law are involved, and it appears that the injunction was improvidently issued, it will be dissolved upon appeal: *Burlington Co. v. Dey*, 82 Iowa 313, 48 N. W. 98, 13 L. R. A. 436, 31 Am. St. Rep. 477; *Gossard v. Crosby*, 132 Iowa 155, 109 N. W. 483, 6 L. R. A. (N. S.) 1115; *Swan v. City of Indianola*, 142 Iowa 731, 121 N. W. 547, 549.

23. Decision on merits not permitted on motion to dissolve.—An attempt to obtain a decision by summary action upon the merits of the case will not be permitted upon a motion to dissolve supported by affidavits only: *Wingert v. City of Tipton*, 134 Iowa 97, 108 N. W. 1035, 111 N. W. 432.

24. A temporary writ of Injunction improvidently issued in behalf of a plaintiff not without fault is properly dissolved and dismissed: *Newby v. Laurence*, 84 Neb. 622, 121 N. W. 965.

CHAPTER CXXIV.

Attachment and Garnishment.

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§ 428. CODE PROVISIONS.

Attachment—When and in what cases may issue.

California, § 537. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases:

- 1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this state, and is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property; or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.
- 2. In an action upon a contract, express or implied, against a defendant not residing in this state.
- 3. In an action against a defendant, not residing in this state, to recover a sum of money as damages, arising from an injury to property in this state, in consequence of negligence, fraud, or other wrongful act. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Alaska, Ann. Codes 1907, C. C. P. (Carter), § 135. † Arizona, Rev. Stats. 1901, §§ 332, 335. ° Arkansas, Dig. of Stats. 1904 (Kirby), § 344. ‡ Colorado, Rev. Stats. 1908, C. C. P. § 97. • Hawaii, Rev. Laws 1905, § 1706; Laws 1905, p. 184, § 2. † Idaho, Rev. Codes 1909, § 4302. ‡ Iowa, Ann. Code 1897, § 3876. † Kansas, Gen. Stats. 1905 (Dassler), §§ 5072, 5125. † Minnesota, Rev. Laws 1905, § 4215. † Missouri, Ann. Stats. 1906, § 366. ‡ Montana, Rev. Codes 1907, §§ 6656, 6658. † Nebraska, Comp. Stats. Ann. 1909, §§ 6741, 6787; Ann. Stats. 1909 (Cobbey), §§ 1171, 1216. ‡ Nevada, Comp. Laws Ann. 1900 (Cutting), § 3218. ‡ New Mexico, Comp. Laws 1897, § 2685, sub-secs. 182-184, 206. ° North Dakota, Rev. Codes 1905, §§ 6938, 6939. ‡ Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), §§ 4365, 4417; Comp. Laws 1909 (Snyder), §§ 5701, 5753. ‡ Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 296. ‡ South Dakota, Rev. Codes 1903, C. C. P. § 205. ‡ Texas, Civ. Stats. 1897 (Sayles), Arts. 186-189. ‡ Utah, Comp. Laws 1907, § 3064. ‡ Washington, Code 1910 (Rem. & Bal.), §§ 647, 649. ‡ Wisconsin, Stats. 1898 (San. & Ber. Ann.), §§ 2729, 2730. ‡ Wyoming, Rev. Stats. 1899, §§ 3988, 4031.

* Alaska, C. C. P. § 135, same as Cal. C. C. P. § 537, down to include the word "money" in second line of sub. 1, then omit the remainder of sub. 1 and substitute the words "and which is not secured by mortgage, lien, or pledge upon real or personal property, or, if so secured, when such security has been rendered nugatory by the act of the defendant." Sub. 2, same as sub. 2, Cal. C. C. P. § 537, except at end change "this state" to "the district." Omit sub. 3 of Cal. C. C. P. § 537.

b1 Arizona, § 332. The plaintiff at the time of filing his complaint, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases:

1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this territory, and is not fully secured by any mortgage or lien upon real or personal property, or any pledge of personal property; or, if originally so secured, such security has without any act of the plaintiff, or the persons to whom the security was given, become valueless.

2. When any suit be pending for damages, and the defendant is about to dispose of or remove his property beyond the jurisdiction of the court in which the action is pending for the pur-

pose of defeating the collection of the judgment.

3. In an action upon a contract, express or implied, against a defendant not residing in this territory or a foreign corporation doing business in this territory.

b2 Arizona, § 335, provides for attachment in certain cases where debt is not yet due.

° Arkansas, § 344. The plaintiff in a civil action may, at or after the commencement thereof, have an attachment against the property of the defendant in the cases and upon the grounds hereinafter stated, as a security for the satisfaction of such judgment as may be recovered:

First. In an action for the recovery of money, where the action is against—

1. A defendant or several defendants who, or some one of whom, is a foreign corporation or non-resident of the state; or,

2. Who has been absent therefrom four months; or,

3. Has departed from this state with intent to defraud his creditors; or,

4. Has left the county of his residence to avoid the service of a summons; or,

5. So conceals himself that a summons can not be served upon him; or,

6. Is about to remove, or has removed, his property, or a material part thereof, out of this state, not leaving enough therein to satisfy the plaintiff's claim or the claim of said defendant's creditors; or,

7. Has sold, conveyed or otherwise disposed of his property, or suffered or permitted it to be sold, with the fraudulent intent to cheat, hinder or delay his creditors; or,

8. Is about to sell, convey or otherwise dispose of his property with such intent. But an attachment shall not be granted on the ground that the defendant or defendants, or any of them, is a foreign corporation or non-resident of this state for any claim other than a debt or demand arising upon contract.

9. The cause of attachment mentioned in the preceding subdivisions against one or more defendants to a civil action shall not authorize an attachment against any of the defendants who are not embraced in any of said subdivisions, but the estate or interest of such defendants only as are embraced therein shall be subject to attachment.

Second. In an action to recover possession of personal property where it has been ordered to be delivered to the plaintiff, and where the property, or part thereof, has been disposed of, concealed or removed, so that the order for its delivery can not be executed by the officer.

4 Colorado, C. C. P. § 97. The plaintiff, at the time of issuing the summons or filing the complaint in an action on contract, express or implied, or at any time afterward before judgment, may have the property of the defendant, not exempt from execution, attached as security for any judgment that may be recovered in such action in the manner prescribed in this chapter, unless the defendant shall give good and sufficient security to secure the payment of such judgment.

51 Hawaii, § 1706. Such magistrate shall issue an attachment against the personal property of the defendant when requested in any action founded on a judgment or on a contract, express or implied, if the plaintiff, or some one in his behalf, shall make and file in such court an affidavit specifying, as near as may be, the amount due the plaintiff from the defendant, exclusive of all set-offs and counterclaims, and containing a further statement either that the deponent knows, or has good reason to believe;

First, that the defendant contracted the debt sued upon in a fraudulent and deceitful manner, or upon false and unfounded pretenses; or

Second, that the defendant has assigned, disposed of, or concealed, or is about to assign, dispose of or conceal his property, with the intent to defraud his creditors; or

Third, that the defendant is about to remove any of his property from the island wherein such application is made, with the like intent, and that he refuses and neglects to pay or secure the payment of the debt; or

Fourth, that the defendant has absconded to the injury of his creditors; or is not a resident of this territory; or has not resided therein for one month immediately preceding such application;

* * *

52 Hawaii, Laws 1905, p. 184, § 2. The plaintiff, in any action upon a contract, express or implied, may, at the time of commencing such action, or at any time afterward before judgment, have the property of the defendant, or that of any one or more of several defendants, which is not exempt from execution, attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover, but no writ of attachment shall be issued against the territory, or any political or municipal corporation or subdivision thereof. (Amended Apr. 3, 1909, Laws 1909, p. 75.)

1 Idaho, § 4302, same as Cal. C. C. P. § 537, except insert after "action" in the first line of sub. 1, the words "upon a judgment, or" before "upon"; also after the words "money, where" in the second line of that sub. omit the words "the contract is made or is payable in this state, and"; also in sub. 2, line 1, after "upon a" insert the words "judgment or upon"; also omit sub. 3 of Cal. C. C. P. § 537.

2 Iowa, § 3876. The plaintiff in a civil action may cause the property of the defendant not exempt from execution to be attached at the commencement or during the progress of the proceedings, by pursuing the course hereinafter prescribed.

31 Kansas, § 5072. The plaintiff in a civil action for the recovery of money or in a suit for alimony may, at or after the commencement thereof, have an attachment against the property of the defendant, and upon one or more of the grounds herein stated:

First, When the defendant or one of several defendants is a foreign corporation, or a non-resident of this state;

but no order of attachment shall be issued on the ground or grounds in this clause stated for any claim other than a debt or demand arising upon contract, judgment or decree, unless the cause of action arose wholly within the limits of this state, which fact must be established on the trial.

Second, When the defendant or one of several defendants has absconded with intention to defraud his creditors.

Third, Has left the county of his residence to avoid the service of summons.

Fourth, So conceals himself that a summons cannot be served upon him.

Fifth, Is about to remove his property or a part thereof out of the jurisdiction of the court, with the intent to defraud his creditors.

Sixth, Is about to convert his property or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors.

Seventh, Has property or rights in action, which he conceals.

Eighth, Has assigned, removed or disposed of, or is about to dispose of, his property or a part thereof with the intent to defraud, hinder or delay his creditors.

Ninth, Fraudulently contracted the debt, or fraudulently incurred the liability or obligation for which the suit is about to be or has been brought.

Tenth, Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or the seduction of any female.

Eleventh, When the debtor has failed to pay the price or value of any article or thing delivered, which by contract he was bound to pay upon delivery. (Amended, Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 190.)

22 Kansas, § 5125, provides that attachments may issue in certain cases for debts not yet due. (Amended Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 221.)

1 Minnesota, § 4215. In an action for the recovery of money, other than for libel, slander, seduction, breach of promise of marriage, false imprisonment, malicious prosecution, or assault and battery, the plaintiff, at the time of issuing the summons or at any time thereafter, may have the property of the defendant attached in the manner hereinafter prescribed, as security for

the satisfaction of such judgment as he may recover. A writ of attachment shall be allowed by a judge of the court in which the action is brought, or a court commissioner of the county. The action must be begun as provided in § 4081 not later than sixty days after issuance of the writ.

1 Missouri, § 366. In any court having competent jurisdiction, the plaintiff in any civil action may have an attachment against the property of the defendant, or that of any one or more of several defendants, in any one or more of the following cases:

1. Where the defendant is not a resident of this state.

2. Where the defendant is a corporation, whose chief office or place of business is out of this state.

3. Where the defendant conceals himself, so that the ordinary process of law cannot be served upon him.

4. Where the defendant has absconded or absented himself from his usual place of abode, in this state, so that the ordinary process of law cannot be served upon him.

5. Where the defendant is about to remove his property or effects out of this state, with the intent to defraud, hinder or delay his creditors.

6. Where the defendant is about to remove out (of) this state, with the intent to change his domicile.

7. Where the defendant has fraudulently conveyed or assigned his property or effects, so as to hinder or delay his creditors.

8. Where the defendant has fraudulently concealed, removed or disposed of his property or effects, so as to hinder or delay his creditors.

9. Where the defendant is about fraudulently to convey or assign his property or effects, so as to hinder or delay his creditors.

10. Where the defendant is about fraudulently to conceal, remove or dispose of his property or effects, so as to hinder or delay his creditors.

11. Where the cause of action occurred out of this state, and the defendant has absconded, or secretly removed his property or effects into this state.

12. Where the damages for which the action is brought are for injuries arising from the commission of some felony or misdemeanor, or for the seduction of any female.

13. Where the debtor has failed to pay the price or value of any article or thing delivered, which, by contract, he was bound to pay upon the delivery.

14. Where the debt sued for was fraudulently contracted on the part of the debtor.

k1 Montana, § 6656. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, as follows:

In an action upon a contract, express or implied, for the direct payment of money, where the contract is not secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless.

k2 Montana, § 6658, provides for attachment on debts not due.

l1 Nebraska, § 6741, substantially same as Kansas § 5072, as amended 1909, C. C. P. § 190, except in the opening passage after "money" omit "or in a suit for alimony" before "may"; also in the same passage near the end after "upon" omit "one or more of" before "the grounds"; also in sub. 1 omit all after the semicolon following "state"; also in sub. 8, near the end, after "defraud" omit "hinder or delay" before "his creditors"; also omit all of subs. 10 and 11 of the Kansas statute and after the period following "brought" at the end of sub. 9 add "But an attachment shall not be granted on the ground that the defendant is a foreign corporation, or a non-resident of this state, for any claim other than a debt or demand arising upon contract, judgment or decree."

l2 Nebraska, § 6787, provides for the issuance of attachments on debts not yet due, in certain cases.

m Nevada, § 3218. The plaintiff, at the time of issuing the summons, or at any time afterwards, may have the property of the defendant attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment as hereinafter provided in the following cases:

First—In an action upon a judgment or upon a contract, expressed or implied, for the direct payment of money, which is not secured by mortgage, lien or pledge upon real or personal property situated or being in this state, and if so secured when such security has been rendered nugatory by the act of the defendant.

Second—In an action against a defendant not residing in this state.

Third—In an action by a resident of this state for the recovery of the value of property, where such property has been converted by a defendant without the consent of the owner.

Fourth—Where a defendant has absconded, or is about to abscond with the intent to defraud his creditors.

Fifth—Where a defendant conceals himself so that service of summons can not be made upon him.

Sixth—Where a defendant is about to remove his property, or any part thereof, beyond the jurisdiction of the court, with the intent to defraud his creditors.

Seventh—Where a defendant is about to convert his property, or any part thereof, into money, with the intent to place it beyond the reach of his creditors.

Eighth—Where a defendant has assigned, removed, disposed of, or is about to dispose of his property, or any part thereof, with the intent to defraud his creditors.

Ninth—Where a defendant has fraudulently or criminally contracted the debt or incurred the obligation for which suit has been commenced. (Amended Mch. 12, 1907, Stats. 1907, p. 105.)

n1 New Mexico, § 2685, sub-sec. 182. Creditors may sue their debtors in the district courts, by attachment, in the following cases, to-wit:

I. When the debtor is not a resident of, nor resides in this territory;

II. When the debtor has concealed himself, or absconded, or absented himself from his usual place of abode in this territory, so that the ordinary process of law can not be passed upon him;

III. When the debtor is about to remove his property or effects out of this territory, or has fraudulently concealed or disposed of his property or effects so as to defraud, hinder or delay his creditors;

IV. When the debtor is about fraudulently to convey or assign, conceal or

dispose of his property or effects, so as to hinder, delay or defraud his creditors;

V. When debt was contracted out of this territory, and the debtor has absconded or secretly removed his property or effects into the territory, with the intent to hinder, delay or defraud his creditors;

VI. Where the defendant is a corporation whose principal office or place of business is out of this territory, unless such corporation shall have a designated agent in the territory, upon whom service of process may be made in suits against the corporation;

VII. Where the defendant fraudulently contracted the debt or incurred the obligation respecting which the suit is brought or obtained credit from the plaintiff by false pretenses.

An attachment may issue on a demand not yet due in any case where an attachment is authorized, in the same manner as upon demands already due. (Laws 1907, p. 270.)

n2 New Mexico, § 2685, sub-sec. 183. Wherever an attachment may issue against the property of any person upon any debt or other action founded upon contract, attachment may also issue upon any action founded upon a tort or other action ex dilectu [delicto]; this law shall apply to actions which have heretofore or may hereafter accrue. (Laws 1907, p. 270.)

n3 New Mexico, § 2685, sub-sec. 184. A creditor wishing to sue his debtor by attachment, may place in the clerk's office of the district court of any county in this territory, having jurisdiction a complaint, or other lawful statement of his cause of action, and shall also file an affidavit and bond; and thereupon such creditor may sue out an original attachment against the lands, tenements, goods, moneys, effects and credits of the debtor in whosoever hands they may be. (Laws 1907, p. 271.)

n4 New Mexico, § 2685, sub-sec. 206. Any person wishing to sue his debtor by attachment may do so by first filing with the clerk of the district court of the county having jurisdiction, or before the clerk of the probate court of such county, an affidavit and bond, as required to be made before the clerk of the district court, which shall authorize the clerk before whom such affidavit and bond shall be filed to issue writs of attachment, the same as clerks of the

district court, which attachment, together with the affidavit and bond, when issued by clerks of the probate court, shall be by them made returnable as when issued out of the district court, and such affidavit and bond, and a duplicate of such writ shall be immediately transmitted by such probate clerk to the clerk of the district court of such county. (Laws 1907, p. 275.)

o1 North Dakota, § 6938. In an action on a contract or judgment for the recovery of money only, for the wrongful conversion of personal property, or for damages, whether arising out of contract or otherwise, the plaintiff at or after the commencement thereof may have the property of the defendant attached in the following cases:

1. When the defendant is not a resident of this state or is a foreign corporation.

2. When the defendant has absconded or concealed himself.

3. When the defendant has removed or is about to remove his property, or a material part thereof from this state, not leaving enough therein for the payment of his debts.

4. When the defendant has sold, assigned, transferred, secreted or otherwise disposed of, or is about to sell, assign, transfer, secrete, or otherwise dispose of his property, with intent to cheat or defraud his creditors, or to hinder or delay them in the collection of their debts.

5. When the defendant is about to remove his residence from the county where he resides with the intention of permanently changing the same and fails or neglects on demand to give security for the debt upon which the action is commenced.

6. When the debt upon which the action is commenced was incurred for property obtained under false pretenses.

7. When the defendant is about to remove his property or a material part thereof from the state with the intent or to the effect of cheating or defrauding his creditors or hindering or delaying them in the collection of their debts.

8. In an action to recover purchase money, for personal property sold to the defendant, an attachment may be issued and levied upon such property.

o2 North Dakota, § 6939, provides for the issuance of attachments on debts not yet due, in certain cases.

p¹ Oklahoma, § 4365, substantially same as Kansas § 5072, as amended, 1909, C. C. P. § 190, except in the opening passage after "money" omit "or in a suit for alimony" before "may"; also in the same passage near the end, after "upon" omit "one or more of" before "the grounds."

p² Oklahoma, § 4417, provides for attachments in certain cases on debts not yet due. (Amended, Sess. Laws 1905, see Compiled Laws 1909, § 5753.)

q Oregon, § 296, substantially same as Alaska C. C. P. § 135.

r South Dakota, C. C. P. § 205. In all cases against a corporation created by or under the laws of any other state, territory, government or country, which has not complied with the laws of this state relative to the appointment of agents upon whom service of process may be made, or against a defendant who is not a resident of this state, or against a defendant who has absconded or concealed himself, or whenever any person or corporation is about to remove any of his or its property from this state, or has assigned, disposed of, secreted or is about to assign, dispose of or secrete any of his or its property with intent to defraud creditors, as hereinafter mentioned, the plaintiff at the time of issuing the summons, or at any time afterwards, may have the property of such defendant or corporation attached, in the manner hereinafter prescribed, as security for the satisfaction of such judgment as the plaintiff may recover, and for the purposes of this section an action shall be deemed commenced when the summons is issued; provided, however, that personal service of such summons shall be made, or publication thereof commenced within thirty days. (Re-enacted Feb. 26, 1907, Sess. Laws 1907, pp. 165, 186.)

s¹ Texas, Art. 186. The judges and clerks of the district and county courts and justices of the peace, may issue writs or original attachment, returnable to their respective courts, upon the plaintiff, his agent or attorney, making an affidavit in writing, stating:

1. That the defendant is justly indebted to the plaintiff and the amount of the demand; and

2. That the defendant is not a resident of the state, or is a foreign corporation, or is acting as such; or

3. That he is about to remove permanently out of the state, and has refused to pay or secure the debt due the plaintiff; or

4. That he secretes himself so that the ordinary process of law cannot be served on him; or

5. That he has secreted his property for the purpose of defrauding his creditors; or

6. That he is about to secrete his property for the purpose of defrauding his creditors; or

7. That he is about to remove his property out of the state, without leaving sufficient remaining for the payment of his debts; or

8. That he is about to remove his property, or a part thereof, out of the county where the suit is brought, with intent to defraud his creditors; or

9. That he has disposed of his property, in whole or in part, with intent to defraud his creditors; or

10. That he is about to dispose of his property with intent to defraud his creditors; or

11. That he is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or

12. That the debt is due for property obtained under false pretenses.

s² Texas, Art. 187. The affidavit shall further state—

1. That the attachment is not sued out for the purpose of injuring or harassing the defendant; and

2. That the plaintiff will probably lose his debt unless such attachment is issued.

s³ Texas, Art. 188. No such attachment shall issue until the suit has been duly instituted, but it may be issued in a proper case either at the commencement of the suit or at any time during its progress.

s⁴ Texas, Art. 189, provides for attachments on debts not yet due.

t Utah, § 3064. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant, not exempt from execution, attached as security for the satisfaction of any judgment that may be recovered, unless the defendant give security to pay such judgment, as in this chapter provided, in the following cases: In an action upon a judgment or upon a contract express or implied, which is not

secured by any mortgage or lien upon real or personal property situated or being in this state, or, if, originally so secured, when such security has, without any act of the plaintiff, or of the person to whom the security was given, become valueless; against a defendant who—

1. Is not residuary in this state; or
2. Stands in defiance of an officer, or conceals himself so that process cannot be served upon him; or,
3. Has assigned, disposed of, or concealed, or is about to assign, dispose of, or conceal, any of his property with intent to defraud his creditors; or,
4. Has departed or is about to depart from the state to the injury of his creditors; or,
5. Fraudulently contracted the debt, or incurred the obligation respecting which the action is brought.

u1 Washington, § 647. The plaintiff at the time of commencing an action, or at any time afterward before judgment, may have the property of the defendant, or that of any one or more of several defendants, attached in the manner hereinafter prescribed, as security for the satisfaction of such judgment as he may recover.

u2 Washington, § 649, provides for attachment on debts not due.

vi Wisconsin, § 2729. Any creditor shall be entitled to proceed by attachment in the circuit court for the proper county, against the property of his debtor, whether a natural person or corporation, in the cases, upon the conditions and in the manner prescribed in this chapter. No writ of attachment shall be issued against a municipal corporation, or in any action, or in aid of any action, or in aid of any execution in any action brought to recover the price

or value of strong, spirituous, malt, ardent, or intoxicating liquors sold at retail. (Amended June 2, 1909, Laws 1909, p. 292.)

v2 Wisconsin, § 2730. The writ of attachment shall be issued on the request of the plaintiff, by the clerk of the court, either at the time of the issuing of the summons in the action or at any time thereafter before final judgment. It shall be directed by the style of "The state of Wisconsin" to the sheriff or other proper officer of some county in which the property of the defendant, so proceeded against, may be supposed to be, and shall require him to attach and safely keep all the property of such defendant within his county or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses. It shall be attested in the name of the presiding judge of the court and be sealed with its seal.

w1 Wyoming, § 3988, substantially same as Kansas § 5072, as amended 1909, C. C. P. § 190, except in the opening passage after "money" omit "or in a suit for alimony" before "may"; also in the same passage near the end after "upon" omit "one or more of" before "the grounds"; also in sub. 1 after "state" omit the semicolon and all the remainder of the sub. and insert in lieu thereof a comma and the words "or is about to become a non-resident thereof"; also in sub. 8 near the end after "defraud" omit "hinder or delay" before "his creditors"; also near the beginning of sub. 9 after "fraudulently" insert "or criminally" before "contracted"; also omit entirely subs. 10 and 11.

w2 Wyoming, § 4031, provides for attachments on debts not yet due.

Affidavit for attachment.

California, § 538. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, showing:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-off or counterclaims) upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any

pledge of personal property, or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or,

2. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal sets-off or counterclaims) and that the defendant is a non-resident of the state; or,

3. That plaintiff's cause of action against defendant is one to recover a sum of money as damages (specifying the amount thereof) arising from an injury to property in this state in consequence of the negligence, fraud, or other wrongful act of defendant, and that the defendant is a non-resident of the state; and

4. That the attachment is not sought, and the action is not prosecuted, to hinder, delay, or defraud any creditor of the defendant. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Alaska, Ann. Codes 1907, C. C. P. (Carter), § 136. • Arizona, Rev. Stats. 1901, § 333. • Arkansas, Dig. of Stats. 1904 (Kirby), § 345. • Colorado, Rev. Stats. 1908, C. C. P. § 98. • Hawaii, Rev. Laws 1905, § 1706; Laws 1905, p. 184, § 3. • Idaho, Rev. Codes 1909, § 4303. • Iowa, Ann. Code 1897, § 3878. • Kansas, Gen. Stats. 1905 (Dassler), § 5073. • Minnesota, Rev. Laws 1905, § 4216. • Missouri, Ann. Stats. 1906, § 371. • Montana, Rev. Codes 1907, § 6657. • Nebraska, Comp. Stats. Ann. 1909, § 6742; Ann. Stats. 1909 (Cobbey), § 1172. • Nevada, Comp. Laws Ann. 1900 (Cutting), § 3219. • New Mexico, Comp. Laws 1897, § 2685, sub-sec. 185. • North Dakota, Rev. Codes 1905, § 6942. • Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 4366; Comp. Laws 1909 (Snyder), § 5702. • Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 297. • South Dakota, Rev. Codes 1903, C. C. P. § 207. • Texas, Civ. Stats. 1897 (Sayles), Arts. 186, 187. • Utah, Comp. Laws 1907, § 3066. • Washington, Code 1910 (Rem. & Bal.), § 648. • Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2731. • Wyoming, Rev. Stats. 1899, § 3989.

• Alaska, C. C. P. § 136. A writ of attachment shall be issued by the clerk of the court in which the action is pending, whenever the plaintiff or any one in his behalf shall make and file an affidavit showing—

First. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) upon a contract, expressed or implied, for the direct payment of money and that the

payment of the same has not been secured by any mortgage, lien or pledge upon real or personal property; and

Second. That the sum for which the attachment is asked is an actual bona fide existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought nor the action prosecuted to hinder, delay, or defraud any creditor of the defendant.

• Arizona, § 333. The clerk of the court or justice of the peace must issue

the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, showing:

1. That the defendant is indebted to the plaintiff upon a contract, express or implied, for the direct payment of money, and that such contract was made or is payable in this territory, and that the payment of the same has not been fully secured by mortgage, lien or pledge as hereinbefore provided, or, if originally so secured, that such security has, without any act of the plaintiff or the persons to whom the security was given, become valueless, and shall specify the character of the indebtedness, that the same is due to the plaintiff over and above all legal set-offs or counterclaims, and that demand has been made for the payment of the amount due, or

2. That the defendant is indebted to the plaintiff, stating the amount and character of the debt; that the same is due and payable over and above all legal set-offs and counterclaims, and that the defendant is a non-resident or is a foreign corporation doing business in this territory; or

3. That an action pending between the parties, and that the defendant is about to remove his property beyond the jurisdiction of the court to avoid payment of the judgment; and

4. That the attachment is not sought for a wrongful or malicious purpose, and that the action is not prosecuted to hinder or delay any creditor of the defendant.

c Arkansas, § 345. An order of attachment shall be made by the clerk of the court in which the action is brought in any case mentioned in the first subdivision of the preceding section, where there is filed in his office an affidavit of the plaintiff or of some one in his behalf, showing:

First. The nature of the plaintiff's claim.

Second. That it is just.

Third. The amount which the affiant believes the plaintiff ought to recover; and,

Fourth. The existence in the action of some one of the grounds for an attachment enumerated in that subdivision, and in the case mentioned in the second subdivision of the preceding section where it is shown by such affidavit, or by the return of the sheriff or other

officer upon the order for the delivery of the property claimed, that the facts mentioned in that subdivision exist.

d Colorado, C. C. P. § 98. No writ of attachment shall issue unless the plaintiff, his agent or attorney, or some credible person for him, shall file in the office of the clerk of the court in which the action is brought, an affidavit setting forth that the defendant is indebted to such plaintiff, stating the nature and amount of such indebtedness as near as may be, and alleging any one or more of the following causes for attachment, viz.:

First—That defendant is not a resident of this state.

Second—That the defendant is a foreign corporation.

Third—That the defendant is a corporation whose chief office or place of business is out of the state.

Fourth—That the defendant conceals himself, or stands in defiance of an officer, so that process of law cannot be served upon him, or that the defendant has for more than four months been absent from the state, or that for such length of time his whereabouts have been unknown, and that the indebtedness mentioned in the affidavit has been due during all the said period.

Fifth—That the defendant is about to remove his property or effects, or a material part thereof, out of this state, with intent to defraud, or hinder, or delay his creditors, or some one or more of them.

Sixth—That the defendant has fraudulently conveyed or transferred or assigned his property or effects, so as to hinder or delay his creditors, or some one or more of them.

Seventh—That the defendant has fraudulently concealed or removed, or disposed of his property or effects, so as to hinder or delay his creditors, or some one or more of them.

Eighth—That the defendant is about to fraudulently convey, or transfer, or assign his property or effects, so as to hinder or delay his creditors, or some one or more of them.

Ninth—That the defendant is about to fraudulently conceal, or remove, or dispose of his property or effects, so as to hinder or delay his creditors; or that such debtor has departed, or is about to depart from this state with the inten-

tion of having his effects removed from the state.

Tenth—That the defendant has failed or refused to pay the price or value of any article or thing delivered to him, which he should have paid for upon the delivery thereof.

Eleventh—That the defendant has failed or refused to pay the price or value of any work or labor done or performed, or for any services rendered by the plaintiff at the instance of the defendant, and which should have been paid at the completion of such work, or when such services were fully rendered.

Twelfth—That the defendant fraudulently contracted the debt, or fraudulently incurred the liability respecting which the suit is brought, or by false representation, or false pretenses, or by any fraudulent conduct, procured money or property of the plaintiff.

^{e1} Hawaii, § 1706, see note ^e to Cal. C. C. P. § 537.

^{e2} Hawaii, Laws 1905, p. 184, § 3. The writ of attachment shall be issued by the clerk of the court in which the action is pending; but before any such writ of attachment shall issue, the plaintiff, or some one in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all just credits and offsets) and that the attachment is not sought and the action is not prosecuted to hinder, delay or defraud any creditor of the defendant. (Amended Apr. 2, 1909, Laws 1909, p. 75.)

^f Idaho, § 4303. The clerk of the court must issue the writ of attachment, upon receiving an affidavit by or on behalf of plaintiff, setting forth:

1. That the defendant is indebted to the plaintiff (specifying the amount of such indebtedness over and above all legal set-offs or counterclaims) and whether upon a judgment or upon a contract for the direct payment of money, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, or, if originally secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; or

2. [Sub. 2 same as Cal. C. C. P. § 538.]

Omit sub. 3 of Cal. statute; sub. 3 of Idaho same as sub. 4 Cal. C. C. P. § 538.

^g Iowa, § 3878. The petition which asks an attachment must in all cases be sworn to. It must state one or more of the following grounds:

1. That the defendant is a foreign corporation or acting as such;

2. That he is a non-resident of the state;

3. That he is about to remove his property out of the state without leaving sufficient remaining for the payment of his debts;

4. That he has disposed of his property, in whole or in part, with intent to defraud his creditors;

5. That the defendant is about to dispose of his property with intent to defraud his creditors;

6. That he has absconded, so that the ordinary process cannot be served upon him;

7. That he is about to remove permanently out of the county, and has property therein not exempt from execution, and that he refuses to pay or secure the plaintiff;

8. That he is about to remove permanently out of the state, and refuses to pay or secure the debt due the plaintiff;

9. That he is about to remove his property or a part thereof out of the county with intent to defraud his creditors;

10. That he is about to convert his property or a part thereof into money for the purposes of placing it beyond the reach of his creditors;

11. That he has property or rights in action which he conceals;

12. That the debt is due for property obtained under false pretenses.

The causes for the attachment shall not be stated in the alternative.

^h Kansas, § 5073. An order of attachment shall be issued by the clerk of the court in which the action is brought in any case mentioned in the preceding section, when there is filed in his office an affidavit of the plaintiff, his agent or attorney, showing: first, the nature of the plaintiff's claim; second, that it is just; third, the amount which the affiant believes the plaintiff ought to recover; and fourth, the existence of some one of the grounds for an attachment enumerated in the preceding section. (Amended Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 191.)

1 Minnesota, § 4216. To obtain such writ, the plaintiff, his agent or attorney, shall make affidavit that a cause of action exists against the defendant specifying the amount of the claim and the ground thereof, and alleging:

1. That the debt was fraudulently contracted; or

2. That defendant is a foreign corporation, or not a resident of this state; or

3. That he has departed from the state, as affiant verily believes, with intent to defraud or delay his creditors, or to avoid the service of a summons, or keeps himself concealed therein with like intent; or

4. That he has assigned, secreted, or disposed of his property, or is about to do so, with intent to delay or defraud his creditors.

2 Missouri, § 371. The affidavit shall be made by the plaintiff, or some person for him, and shall state that the plaintiff has a just demand against the defendant, and that the amount which the affiant believes the plaintiff ought to recover, after allowing all just credits and set-offs, is ——— dollars, and that he has good reason to believe, and does believe, in the existence of one or more of the causes which, according to the provisions of section 366 of this chapter, would entitle the plaintiff to sue by attachment.

3 Montana, § 6657, same as Cal. C. C. P. § 538, except omit subs. 2 and 3 of Cal. statute and renumber sub. 4 to sub. 2.

4 Nebraska, § 6742, same as Kansas § 5073 (as amended in 1909, C. C. P. § 191), except in the second line change "issued" to "made."

5 Nevada, § 3219. The clerk of the court shall issue the writ of attachment upon receiving and filing an affidavit by or on behalf of the plaintiff showing the nature of the plaintiff's claim, that same is just, the amount which the affiant believes the plaintiff is entitled to recover, and the existence of any one of the grounds for an attachment enumerated in the preceding section.

6 New Mexico, § 2685, sub-sec. 185. The affidavit shall be made by the plaintiff, or some person for him, and shall state that the defendant is justly indebted to the plaintiff, after allowing all just credits and offsets, in a sum (to be specified in the affidavit), and on what account, and shall also state that the

affiant has good reason to believe, and does believe, the existence of one or more of the causes, which, according to the provision of sub-section 182, will entitle the plaintiff to sue by attachment. (Laws 1907, p. 271.)

7 North Dakota, § 6942. The warrant shall issue upon a verified complaint, setting forth a proper cause of action for attachment in favor of the plaintiff and against the defendant, and an affidavit, setting forth in the language of the statute one or more of the grounds of attachment enumerated in section 6938, if the claim is due upon which the action is commenced; and if not due, one or more of the grounds of attachment enumerated in subdivisions 3, 4, 6, and 7 of that section.

8 Oklahoma, § 4366, same as Kansas § 5073, as amended in 1909, C. C. P. § 191, except in the second line change "issued" to "made."

9 Oregon, § 297. A writ of attachment shall be issued by the clerk of the court in which the action is pending whenever the plaintiff, or any one in his behalf, shall make and file an affidavit showing: first, that the defendant is indebted to the plaintiff, specifying the amount of such indebtedness over and above all legal set-offs or counterclaims upon a contract for the payment of money; and, second, either (1) that the payment of the same has not been secured by any mortgage, lien, or pledge upon real or personal property; or (2) that the same was secured by a mortgage, lien, or pledge (as the case may be), but that such security has been rendered nugatory by the act of the defendant; or (3) that the defendant is a non-resident of the state; third, that the sum for which the attachment is asked is an actual bona fide existing debt, due and owing from the defendant to the plaintiff, and that the attachment is not sought nor the action prosecuted to hinder, delay nor defraud any creditor of the defendant.

10 South Dakota, C. C. P. § 207. The warrant may issue upon affidavit, stating:

1. That a cause of action exists against such defendant specifying the amount of the claim and the grounds thereof; and,

2. That the defendant is either a foreign corporation, and has not complied with the laws of this state relative to

the appointment of agents upon whom service of process may be made, or is not a resident of this state, or has departed therefrom with intent to defraud his creditors, or to avoid the service of summons, or keeps himself concealed therein with the like intent; or

3. That the debt was incurred for property obtained under false pretenses; or,

4. That such corporation or person has removed, or is about to remove, any of his or its property from this state with intent to defraud his or its creditors; or,

5. Has assigned, disposed of, or secreted, or is about to assign, dispose of, or secrete, any of his or its property with the like intent, whether such defendant be a resident of this state or not.

* Texas, Art. 186, 187, see note * to Cal. C. C. P. § 537.

† Utah, § 3066. The clerk of the court shall issue the writ of attachment upon receiving an affidavit by or on behalf of the plaintiff, which shall be filed, setting forth:

1. That the defendant is indebted to the plaintiff, specifying the amount of such indebtedness as near as may be over and above all legal counterclaims, and whether upon a judgment or an express or implied contract, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property, situate or being in this state; or, if originally so secured, that such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; and that the same is an actual bona fide existing demand due and owing from the defendant to the plaintiff;

2. And in all cases that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and also specifying one or more of the causes set forth in § 3064 as the ground of the attachment.

‡ Washington, § 648. The writ of attachment shall be issued by the clerk of the court in which the action is pending; but before any such writ of attachment shall issue, the plaintiff, or some one in his behalf, shall make and file with such clerk an affidavit showing that the defendant is indebted to the plaintiff (specifying the amount of such

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indebtedness over and above all just credits and offsets), and that the attachment is not sought and the action is not prosecuted to hinder, delay, or defraud any creditor of the defendant, and either,—

1. That the defendant is a foreign corporation; or

2. That the defendant is not a resident of this state; or

3. That the defendant conceals himself so that the ordinary process of law can not be served upon him; or

4. That the defendant has absconded or absented himself from his usual place of abode in this state, so that the ordinary process of law can not be served upon him; or

5. That the defendant has removed or is about to remove any of his property from this state, with intent to delay or defraud his creditors; or

6. That the defendant has assigned, secreted, or disposed of, or is about to assign, secrete, or dispose of, any of his property, with intent to delay or defraud his creditors; or

7. That the defendant is about to convert his property, or a part thereof, into money, for the purpose of placing it beyond the reach of his creditors; or

8. That the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or

9. That the damages for which the action is brought are for injuries arising from the commission of some felony, or for the seduction of some female.

¶ Wisconsin, § 2731. Before any writ of attachment shall be executed the plaintiff or some one in his behalf shall make and annex thereto an affidavit stating that the defendant named in such writ is indebted to the plaintiff in a sum exceeding fifty dollars, and specifying the amount of such indebtedness as near as may be, over and above all legal set-offs, and that the same is due upon contract, express or implied, or upon judgment or decree, and containing a further statement that the deponent knows or has good reason to believe either:

1. That the defendant has absconded or is about to abscond from this state, or is concealed therein, to the injury of his creditors, or keeps himself concealed therein with intent to avoid the service of a summons; or

2. That the defendant has assigned, conveyed, disposed of or concealed or is about to assign, convey, dispose of or conceal his property or any part thereof with intent to defraud his creditors; or

3. That the defendant has removed or is about to remove any of his property out of the state with intent to defraud his creditors; or

4. That the defendant fraudulently contracted the debt or incurred the obligation respecting which the action is brought; or

5. That the defendant is not a resident of this state; or

6. That the defendant is a foreign corporation; or if created under the laws of this state that all proper officers thereof on whom to serve the summons do not exist, are non-residents of the state or can not be found; or

7. That the action is brought against a defendant as principal on an official bond to recover money due the state or to some county or other municipality therein, or that the action is brought against the defendant as principal upon a bond or other instrument given as evidence of indebtedness for or to secure the payment of money embezzled or misappropriated by such defendant and whilst acting as an officer of the state or of any county or municipality therein.

Or, an affidavit stating that a cause of action sounding in tort exists in favor of the plaintiff and against the defendant named in such writ, that the dam-

ages sustained and claimed exceed the sum of fifty dollars, specifying the amount claimed, and the further statement, either:

1. That the defendant or any of the defendants is not or are not residents of this state or that his or their residence is unknown and can not with due diligence be ascertained, or

2. That the defendant is a foreign corporation.

An action may be maintained and a writ of attachment issued on a demand not yet due in any cases mentioned in this section, except the cases mentioned in the fifth, sixth and seventh subdivisions, and the same proceedings in the action shall be had and the same affidavit shall be required as in actions upon matured demands except that the affidavit shall state that the debt is to become due; provided, that the undertaking specified in section 2732 shall be conditioned in three times the amount demanded. In case an attachment be issued before the maturity of the debt and a traverse to such attachment is sustained the court shall dismiss the action and shall render a judgment of costs against the plaintiff.

W Wyoming, § 3989, substantially same as Kansas § 5073, as amended in 1909, C. C. P. § 191, except in the second line change "issued" to "made"; also at the end add "or that the affiant has good reason to believe and does believe that some one or more of said grounds (stating which ones) exists."

Action upon undertaking in attachment.

California, § 552. If the execution be returned unsatisfied, in whole or in part, the plaintiff may prosecute any undertaking given pursuant to section five hundred and forty or section five hundred and fifty-five, or he may proceed, as in other cases, upon the return of an execution. (Kerr's Cyc. Code Civ. Proc.)

[Sections 540 and 555 Cal. C. C. P., referred to in the foregoing section, provide for the giving of bonds to secure releases.]

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Arizona, Rev. Stats. 1901, § 360. • Arkansas, Dig. of Stats. 1904 (Kirby), §§ 389, 390. Idaho, Rev. Codes 1909, § 4317. • Iowa, Ann. Code 1897, § 3908. • Kansas, Gen. Stats. 1905 (Dassler), § 5118. • Missouri, Ann. Stats. 1906, §§ 419, 420. Montana, Rev. Codes 1907, § 6677. • Nebraska, Comp. Stats. Ann.

1909, § 6772; Ann. Stats. 1909 (Cobbey), § 1202. Nevada, Comp. Laws Ann. 1900 (Cutting), § 3232. ^s New Mexico, Comp. Laws 1897, § 2685, sub-sec. 226. ^h Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 4410; Comp. Laws 1909 (Snyder), § 5746. ⁱ Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 309. ^j Texas, Civ. Stats. 1897 (Sayles), Art. 215. Utah, Comp. Laws 1907, § 3082. ^k Washington, Code 1910 (Rem. & Bal.), § 672. ^l Wyoming, Rev. Stats. 1899, § 4023.

^a Arizona, § 360. When personal property has been replevied as hereinbefore provided, the judgment shall also be against the defendant and his sureties on his replevy bond for the amount of the judgment, interest and costs, or for the value of the property replevied and interest according to the terms of such replevy bond.

^{b1} Arkansas, § 389. If the plaintiff shall recover against the defendant, and the attachment shall have been discharged upon the execution of a bond, as provided by section 372, then the court shall render judgment against the defendant and his sureties in said bond for the amount recovered and the cost of the suit.

^{b2} Arkansas, § 390. If the defendant shall have given bond for the retention of the property attached, as provided by section 362, and the attachment shall be sustained, the court or jury, in addition to finding the amount of debt or damages due to the plaintiff, shall, upon demand of the plaintiff, also assess the value of the property attached, and the court shall, in addition to judgment against the defendant for the amount due to the plaintiff and costs, render further judgment, that in case said property shall not be delivered up to the proper officer to be sold, and said officer shall not be able to make said judgment out of the property of said defendant, execution shall then issue against the property of said sureties for so much of said judgment as shall not exceed the value of said property, which execution shall be enforced as in other cases.

^c Iowa, § 3908. Such bond shall be part of the record. If judgment go against the defendant, the same shall be entered against him and sureties.

^d Kansas, § 5118. The court or judge thereof may compel the delivery to the sheriff for sale of the attached property for which an undertaking may have been given, and may proceed summarily on such undertaking to enforce the delivery of the property or the payment of such

sum as may be due upon the undertaking, by rules and attachments as in cases of contempt. (Amended Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 211.)

^{e1} Missouri, § 419. Whenever it shall appear from the return of the officer upon an execution issued in an attachment suit, that none of the property attached has been found, or only a part thereof, and that said execution is not fully satisfied, the court or justice shall direct the officer to assign to the plaintiff, his executor or administrator, the bonds taken by him for the forthcoming of the property attached; and such court or justice may, upon motion, render judgment in favor of the plaintiff, his executor or administrator, against the obligors in the bond, for the value of such property, or if the value of such property should be greater than the amount due upon execution, then for the amount due, together with twenty per cent damages upon such value or amount.

^{e2} Missouri, § 420. No judgment shall be rendered upon such motion unless the plaintiff shall have given the obligors in the bond at least fifteen days' notice, in writing, of such motion.

^f Nebraska, § 6772, substantially same as Kansas § 5118 as amended 1909. C. C. P. § 211, except in line 1 omit "or judge thereof."

^g New Mexico, § 2685, sub-sec. 226. If upon the trial of said cause judgment shall be rendered against the defendant on the demand sued for, such judgment shall also be rendered against the sureties on said bond given for the discharge of said attachment; and the giving of said bond shall have the effect of conferring jurisdiction upon the court to render said judgment against the said sureties, for the amount of the damages recovered against the defendant, without further process or notice. (Laws 1907, p. 279.)

^h Oklahoma, § 4410, same as Nebraska § 6772.

ⁱ Oregon, § 309. If judgment is recov-

ered by the plaintiff, and it shall appear that property has been attached in the action, and has not been sold as perishable property or discharged from the attachment as provided by law, the court shall order and adjudge the property to be sold to satisfy the plaintiff's demands, and if execution issue thereon, the sheriff shall apply the property attached by him or the proceeds thereof, upon the execution, and if there be any such property or proceeds remaining after satisfying such execution, he shall, upon demand, deliver the same to the defendant; or if the property attached shall have been released from attachment by reason of the giving of the undertaking

by the defendant as provided by section 812, the court shall upon giving judgment against the defendant or defendants also give judgment in like manner and with like effect against the surety or sureties in such undertaking. (Amended Feb. 25, 1907, General Laws 1907, p. 256.)

j Texas, Art. 215, same as Arizona § 360, except in the second line change "replevied" to "levied on."

k Washington, § 672. Such bond shall be a part of the record, and if judgment go against the defendant, the same shall be entered against him and sureties.

l Wyoming, § 4023, substantially same as Nebraska § 6772.

§ 429. AFFIDAVITS.

FORM No. 1021—For attachment against residents. (Common form—Alaska, Arizona, California, Hawaii, Idaho, Oregon, Utah.)¹

[Title of court and cause.]

[Venue.]

, the plaintiff in the action above named, being duly sworn, deposes and says: That the defendant above named, , is indebted to , the plaintiff, in a certain sum, that is to say, in the sum of \$, over and above all legal set-offs and counter-claims upon [state whether an express or implied] contract for the direct payment of money to wit: [Here state the nature of the contract, whether a note, bond, etc.]; and that such contract was made [or is payable] in this state, and that the payment of the same has not been secured by any mortgage or lien upon real or personal property, or any pledge of personal property. [Or, if originally so secured, state the facts, and further depose: "that said security has, without any act of the plaintiff, this affiant, become and is absolutely valueless" (or, in Oregon, "nugatory").]

And this deponent further says: That the sum for which the attachment is asked in the cause, that is to say, the amount of indebtedness which is above stated, is an actual, bona fide existing debt, due and owing from the defendant to the plaintiff; and that the attachment is not sought, and the action is not prosecuted, to hinder,

¹ The above form states generally the matters required by the statutes in the states or territories named. Reference should be made to the particular statutes for any particular wording: See Cal. C. C. P. § 538, notes, a Alaska, b Arizona, c Hawaii, f Idaho, g Oregon, t Utah.

delay, or defraud any creditor or creditors of defendant. [Adding, in Arizona, statement as to demand made.]

Subscribed and sworn to before me, this day of , 19 .

[Seal.]

E. F., Clerk.

[Filing endorsement.]

FORM No. 1022—For attachment against non-resident, upon a contract.

[Title of court and cause.]

[Venue.]

A. B., being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that the defendant is indebted to the plaintiff in the sum of \$, over and above all legal set-offs and counterclaims, upon an express [or implied] contract [briefly describing the same]; that the defendant is a non-resident of the state of [California], to wit, a resident of the state of ; that the said sum for which the attachment is asked and sought herein is an actual, bona fide existing debt, due and owing from the defendant to the plaintiff; that the said attachment is not sought, and said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the defendant.

[Signature of affiant.]

[Jurat.]

FORM No. 1023—For attachment against resident. (Nebraska.)¹

(In Tessier v. Reed, Jones & Co., 17 Neb. 105; 22 N. W. 225.)

[Title of court and cause.]

[Venue.]

 , being duly sworn, deposes and says: That he is one of the attorneys for the plaintiff; that the plaintiff has commenced an action against one , in the district court of the county of , to recover the sum of \$, now due and payable to the plaintiff from the defendant upon an account for goods sold and delivered by the plaintiff to the defendant at his request; that said claim is just, and that plaintiff ought, as he believes, to recover thereon the sum of \$; that the defendant is about to convert his property,

¹ As will be seen from the code provisions (§ 428), the form of affidavit for attachment for the states of Kansas, Missouri, Oklahoma, and Wyoming is substantially the same as that used in Nebraska.

or a part thereof, into money for the purpose of placing it beyond the reach of his creditors.

[Signature of affiant.]

[Jurat.]

FORM No. 1024—For attachment against non-resident, where the cause of action is to recover damages arising from an injury to property in the state, in consequence of fraud, negligence, or other wrongful act.

[Title of court and cause.]

[Venue.]

A. B., being duly sworn, deposes and says: That he is the plaintiff in the above-entitled action; that the defendant is a non-resident of this state, he being a resident of the state of ; that a cause of action exists in favor of the plaintiff and against the defendant for damages in the sum of \$ [here specifying], for an injury to [here describe], the property of the plaintiff, situated at , in this state; that the said cause of action is to recover said sum of money as damages arising from said injury, and that said injury to said property was caused by the negligence [or fraud, or other wrongful act] of the defendant, in this [here specify the circumstances of such negligent or fraudulent or other wrongful act]; that this attachment is not sought, and said action is not prosecuted, to hinder, delay, or defraud any creditor or creditors of the defendant.

[Signature of affiant.]

[Jurat.]

FORM No. 1025—For attachment against non-resident, for unliquidated damages ascertainable under a contract.

(In *Coats v. Arthur*, 5 S. Dak. 275; 58 N. W. 675.)

[Title of court and cause.]

[Venue, etc.]

That a cause of action exists against the defendant and in favor of the plaintiff herein; that the amount of said plaintiff's claim herein is \$968, and the ground thereof is as follows: That is to say, that on or about May 9, 1891, at Chicago, Illinois, the defendant, for a valuable consideration, sold, and conveyed by warranty deed, to the plaintiff the following premises, situated in Chicago, Cook County, Illinois, to wit: [Here follows description.] That defend-

ant then and there agreed to and with the plaintiff to complete the buildings upon said premises, and to surrender to the plaintiff the keys and possession of said premises, not later than May 12, 1891; that the defendant thereafter failed and neglected to complete said buildings, and to surrender to the plaintiff the keys and possession of said premises, until August 1, 1891, at which last-named date the same were delivered to the plaintiff; that thereby the plaintiff was deprived of the use and rent of said premises from and after May 12, 1891; that the rental value of said premises from and after May 12, 1891, was and is the sum of \$180 per month, amounting to \$474 to August 1, 1891; that since said last-named date, by reason of the unfavorable season of the year for that purpose, the plaintiff has not been able, although he had made diligent efforts for that purpose, to rent said premises for so large a sum, by \$130 per month, as he would if the same had been delivered to him at the time agreed, to plaintiff's damage in the additional sum of \$494, from August 1 to November 24, 1891, making the total amount of damages sustained by the plaintiff from May 12 to November 24, 1891, by reason of defendant's failure to complete said buildings, and to surrender the keys and possession of said premises to plaintiff, at the agreed time therefor, to wit, May 12, 1891, the sum of \$968; that the defendant, L. J. Arthur, is not a resident of this state, but resides at the city of Evanston, county of Cook, and state of Illinois.

[Signature.]

[Jurat of Notary.]

FORM No. 1026—For attachment against defendant about to leave the state with intent to defraud creditors.

(In *Gans v. Beasley*, 4 N. Dak. 140; 59 N. W. 714.)¹

[Vente.]

Joseph Gans came before me personally, and, being first duly sworn, doth say: That he is the plaintiff in the above-entitled action, which is brought for the recovery of money, and a summons has been issued therein; that a cause of action exists against the defendants and in favor of said plaintiff therein, and the amount of said plaintiff's

¹ An amendment to the affidavit for attachment in *Gans v. Beasley*, supra, was made for the purpose, among other things, of setting forth in terms that the note was executed by the defendants and delivered by them to the plaintiff, and that no part of the note had been paid, etc. Held, that the proposed amendment is superfluous, and added no new feature, as the facts included in the amendment are averred by necessary implication in the original affidavit: *Gans v. Beasley*, 4 N. Dak. 140, 59 N. W. 714.

iff's claim therein is \$10,000, with interest thereon since October 20, at ten per cent per annum, and the ground thereof is as follows, that is to say: defendant's promissory note to plaintiff, as follows, to wit: "\$10,000. Billings, Montana, October 20, 1892. First day of July, 1893, after date, for value received, we jointly and severally promise to pay to the order of Joseph Gans \$10,000, with interest at ten per cent per annum from date until paid, and with attorneys' fees in addition to the costs, in case the holder is to enforce payment at law. [Signed.] W. W. Beasley & Sons. Payable at First National Bank, Helena, Montana"; and that the defendants are not residents of this state; that they are about to remove their property from the state with intent to defraud their creditors, and are about to assign and dispose of their property with like intent. And the said affiant doth depose and say, that said plaintiff is in danger of losing his said claim by reason of the facts aforesaid, unless a writ of attachment shall issue, and prays that such writ of attachment may be allowed and issued against the property of said defendant therein according to the statute in such cases provided; and said affiant says that no previous application has been made therein for such order, and further saith not. [Etc.]

For form of affidavit of attachment, New Mexico procedure, see Laws 1907, § 2685, sub-sec. 207, p. 276.

§ 430. UNDERTAKINGS.

FORM No. 1027—Undertaking on attachment.

[Title of court and cause.]

Whereas, the above-named plaintiff has commenced, or is about to commence, an action in the superior court of the county of _____, state of _____, against the above-named defendant, upon a contract for the direct payment of money, claiming that there is due to said plaintiff from said defendant, the sum of \$ _____, or thereabouts, and _____ is about to apply for an attachment against the property of said defendant, as security for the satisfaction of any judgment that may be recovered therein:

Now, therefore, we, the undersigned, residents of the county of _____, in consideration of the premises, and of the issuing of said attachment, do jointly and severally undertake in the sum of \$ _____, and promise to the effect that if defendant recover judgment, the plaintiff will pay all costs that may be awarded to the said defendant, and all damages which he may sustain by reason of said attachment,

not exceeding the sum specified in this undertaking, of \$; and that if said attachment should be discharged on the ground that the plaintiff was not entitled thereto [under section 537 of the California Code of Civil Procedure], the plaintiff will pay all damages which the defendant may have sustained by reason of said attachment, not exceeding the sum specified in said undertaking, of \$.

Dated at , this day of , 19 .

[Signature of surety.] [Seal.]

[Signature of surety.] [Seal.]

[Oath of sureties as in succeeding form.]

[Approval and filing endorsements.]

FORM No. 1028—Oath of sureties endorsed upon or attached to the foregoing undertaking.

County of . } ss.
State of , }

, and , whose names are subscribed as the sureties to the above undertaking, being severally duly sworn, each for himself, says: That he is a resident and freeholder [or householder] within the said county of ; and that he is worth the sum in the said undertaking specified as the penalty thereof, over and above all his debts and liabilities, exclusive of property exempt from execution.

[Jurat.]

[Signatures.]

FORM No. 1029—Undertaking given to procure an order to discharge an attachment.

[Title of court and cause.]

, the sheriff of the county of , in this state, having, under and by virtue of a writ of attachment issued in this action, attached property of , defendant in the action, which property is described as follows, namely: [Here describe the same]; and the defendant having applied to this court, upon due notice to the plaintiff, for an order to release said property from said attachment, and the court having required, before such order was made, an undertaking on behalf of defendant, and having fixed the amount of said undertaking at \$:

Now, therefore, in consideration of the premises, and for the purpose of the making of said order, we, and , residents and freeholders [or householders] in the county of , state of , undertake, on behalf of said defendant, and are bound to the plaintiff

iff in the sum of \$, and promise the plaintiff that, in case the plaintiff recover judgment in said action, the defendant will, on demand, redeliver the attached property so released to the proper officer, to be applied to the payment of the judgment; or, in default thereof, that the defendant, and we, his sureties, will, on demand, pay to the plaintiff the full value of the property released. [If the value of the property is fixed or agreed upon, insert: "to wit: \$."]

[Date.]

[Signature.]

For form of bond under New Mexico procedure, see Laws 1907, § 2685, sub-sec. 208, p. 276.

§ 431. WRIT, CERTIFICATES, RETURN, ETC.

FORM No. 1030—Writ of attachment.

[Title of court and cause.]

The people of the state of , to the sheriff of the county of , greeting:

Whereas, the above-entitled action [now pending] was commenced in the court of the county of , state of , by the plaintiff therein, to recover from the defendant therein the sum of \$, besides interest at the rate of per cent per annum from the day of , 19 , and costs of suit; and

Whereas, the necessary affidavit and undertaking have been filed herein as required by law:

Now, we do therefore command you, the said sheriff, that you attach and safely keep all the property of the defendant, within your said county, not exempt from execution, or so much thereof as may be sufficient to satisfy the said plaintiff's demand as above mentioned, unless the said defendant give you security by the undertaking of at least two sufficient sureties, in an amount sufficient to satisfy said demand, with costs, or in an amount equal to the value of the property which has been or is about to be attached, in which case you will take such undertaking; and hereof make due and legal service and return.

Witness the Hon. [S. T.], judge of the said court, this day of , 19 .

S. T., Judge.

Attest my hand and the seal of the said court, this day of , 19 .

[Seal.]

F. G., Clerk.

By N. M., Deputy Clerk.

FORM No. 1031—Return of sheriff to writ of attachment.(In *Harrison v. Trader*, 29 Ark. 85.)¹

[Title of court and cause.]

I executed the within writ of attachment at Phillips County, Ark., on the 29th day of March, 1867, by declaring publicly, in the presence of Cameron Biscoe, a citizen of my county, that I did attach the following-named lands as the property of the within-named defendant, William H. Trader, and Ellen Trader, his wife. [Here follows a description of the land.] Levied on by virtue of the within writ of attachment. The said William Trader and Ellen Trader, his wife, are not found in my county.

Bart Y. Turner, Sheriff.

FORM No. 1032—Notice of garnishment [or attachment] of moneys [etc.] owing [or belonging] to defendant.

County of , }
 Sheriff's office. }

To A. B. [naming the garnishee] :

Please take notice, that all moneys, goods, credits, stocks, or interests or shares in the Company, all debts due and owing from you to the defendant above-named, and all other personal property in your possession or under your control, belonging to the said defendant, is hereby garnished [or attached] by virtue of a writ of which the annexed is a true copy; and you are hereby notified not to pay over or transfer said property [debts, etc.] to any one but the undersigned sheriff. You are hereby requested to make a statement of said property.

R. S., Sheriff.

[Copy of writ annexed.]

FORM No. 1033—Certificate by sheriff of execution of writ of attachment in garnishment proceeding.(In *Carter v. Koshland*, 12 Ore. 492; 8 Pac. 556.)

[Endorsed upon the writ:]

I hereby certify that I received the within writ of attachment on the 14th day of May, 1885, at Portland, in the county of Multnomah,

¹ The return to the writ of attachment, form No. 1031, was held to be a good levy on lands, and that the same created a lien thereon from the date of the attachment, under the 7th section of the act approved March 7, 1867: *Harrison v. Trader*, 29 Ark. 85.

in said state, by serving a garnishment upon K. B., as required by law, garnishing all debts, property, moneys, rights, dues, and credits of every nature in their hands or under their control, belonging or owing to the said L. H. Frank, to which the said K. B. made an answer; said answer being hereto attached and made a part of this return.

M. N., Sheriff.

FORM No. 1034—Answer of garnishee to the writ.

(In *Carter v. Koshland*, 12 Ore. 492; 8 Pac. 556.)

[Attached to the writ:]

I hereby return [and answer] that I have no property in my hands at this time, nor have I any property, debts, money, dues, or credits, of any kind or nature, belonging to L. H. Frank [defendant].

[Signed] K. B.

FORM No. 1035—Receipt in satisfaction of claim, and directing release of goods attached.

(In *Levy v. McDowell*, 45 Tex. 220, 222.)

[Title of court and cause.]

Received of the sum of \$182, in full satisfaction of claim of Ralph Levy & Co. against James McDowell; and J. B. Good, sheriff of Colorado County, will release the goods attached in the suit.

R. V. Cook,

Attorney for Ralph Levy & Co., plaintiff.

§ 432. MOTIONS AND ORDERS.

FORM No. 1036—Motion to quash writ of attachment. (Special appearance.)

(In *Holzman v. Martinez*, 2 N. Mex. 271, 282.)

[Title of court and cause.]

And now comes the defendant, and for the purpose of this motion, and for no other, moves the court to quash the writ of attachment herein, for the following reasons, to wit:

1. Said writ of attachment is void on its face.
2. Said writ of attachment is returnable to an impossible day and impossible term, if to any term at all.
3. The said writ bears no teste of any court.
4. The said writ has no endorsement containing a brief statement of the cause of action thereon, as required by law.

5. Said writ is otherwise uncertain, defective, and insufficient in many other respects, as appears from the face thereof.

Said motion will be based upon the papers, records, etc., in said case.

[Etc.]

C. D., Attorney for defendant for said purpose.

FORM No. 1037—Order releasing attachment.

[Title of court and cause.]

, the defendant in this action, having applied for the release of property attached therein, and an undertaking having been given in behalf of , defendant in this action, as required by the court, to obtain an order for the release from attachment of the property of said defendant, , attached under a writ of attachment issued in this action, and the sureties to such undertaking having justified [or no exception to the sufficiency of said sureties having been made] :

It is therefore ordered, that the following-described property of the defendant, , namely: [Here describe the same], which has been attached under writ of attachment issued herein, be and the same is hereby released from said attachment.

[Date.]

S. T., Judge.

FORM No. 1038—Order discharging an attachment improperly or irregularly issued.

[Title of court and cause.]

It appearing to the court that the writ of attachment in this action was improperly [or irregularly] issued [or both improperly and irregularly issued], for the following reasons: [Here state the same briefly:]

It is therefore ordered, that said writ of attachment be and the same is hereby discharged.

[Date.]

S. T., Judge.

FORM No. 1039—Order for the sale of attached property.

[Title of court and cause.]

It appearing to the satisfaction of the court from the stipulation of the attorneys of the parties to the action [or from affidavits or from evidence, as the case may be], that the property under attach-

ment herein is of a perishable character [or that the same is likely to materially depreciate in value], and it appearing that it will be for the interest and advantage of the parties to the action if said property be sold forthwith:

It is therefore ordered, that said property so attached be sold by the sheriff in whose care said property is now held, and that sale thereof be made in the manner provided by law [or, if the statute make no provision as to manner of sale, specify the manner, if desired]; and it is further ordered, that the proceeds of said sale be deposited in court to abide the judgment in this action.

[Date.]

S. T., Judge.

FORM No. 1040—Order reviving proceedings against non-resident defendant, and continuing attachment proceeding.

[Title of court and cause.]

[After introductory part, briefly setting forth filing of motion and hearing thereon:]

It is ordered, that plaintiff have, and he is hereby granted, leave to proceed against _____, the executor [or administrator] of the estate of said _____, deceased, by the service of summons and the complaint upon him as the defendant herein; and that the proceedings by attachment stand revived and continued in the name of said executor as defendant.

[Date.]

S. T., Judge.

Form of petition in an action for abuse of legal process in a civil suit, the defendant having directed the sheriff to serve the execution by a garnishment of a company for a debt due for personal earnings exempt from execution: *Nix v. Goodhill*, 95 Iowa 282, 63 N. W. 701, 58 Am. St. Rep. 484.

§ 433. ANNOTATIONS.—Attachment and garnishment.

1. Limitation upon right to attachment.
- 2, 3. Property subject to attachment.—Corporation stock.
4. Attachment of crops under mortgage.
5. Money lost in gambling.
6. Effect of assignment.
7. Liability upon undertaking.
8. Payee not designated in bond.—Effect of.
9. Liability of sheriff.
- 10, 11. Security for indebtedness.—Omission of statement.
12. Interest not required to be stated.
13. Defense of estoppel in relation to attachment proceedings.
- 14-16. Intervention.
17. Junior attaching creditor may intervene.
18. Texas practice as to intervention.
19. Interplea in attachment.
- 20, 21. Judgment against garnishee.

1. **Limitation upon right to attachment.**—Where a statute provides that the plaintiff may have the property of the defendant attached "in an action arising on contract for the recovery of money only, or in an action for the wrongful conversion of personal property," and further provides that "the warrant may issue upon affidavit stating that a cause of action exists against such defendant, specifying the amount of the claim and the grounds thereof," etc., it has been held that the claim must be for some definite, ascertained amount, or an amount capable of being definitely ascertained and made certain by the contract and the statement in the affidavit; and further, that the language of such statute is broad and comprehensive enough to include all actions on contract for the recovery of money only, whether the damages are liquidated or unliquidated.

There would be included under this rule all claims for damages in which, from the contract and facts stated in the affidavit, the court in applying the law can definitely determine the amount which plaintiff is entitled to recover; and it would exclude all cases where the amount of the claim can be determined by no fixed rule of law, but is to be determined entirely by the opinion of a court or jury: *Coats v. Arthur*, 5 S. Dak. 274, 58 N. W. 675, (Fuller, J., dissenting, and in his opinion stating that he did not consider the statute broad enough in its terms to include cases in which the facts are as stated in the affidavit).

2. **Property subject to attachment.**—**Corporation stock.**—An attachment may be levied upon transferred shares of stock as the property of the transferor, unless such transfer is completed by entry on the books of the corporation: *Weston v. Bear River etc. Co.*, 5 Cal. 186, 187-189, 63 Am. Dec. 117; *Naglee v. Pacific Wharf Co.*, 20 Cal. 529, 533; *Farmers' Nat. Gold Bank v. Wilson*, 58 Cal. 600, 604; *McFall v. Buckeye Grangers' Warehouse Assn.*, 122 Cal. 468, 471, 55 Pac. 253, 68 Am. St. Rep. 47; *First Nat. Bank v. Hastings*, 7 Colo. App. 129, 42 Pac. 691; *Conway v. John*, 14 Colo. 30, 33, 23 Pac. 170; *Ft. Madison Lumber Co. v. Batavian Bank*, 71 Iowa 270, 32 N. W. 336, 60 Am. Rep. 789; *Lyndonville Nat. Bank v. Folsom*, 7 N. Mex. 611, 38 Pac. 253; *In re Argus*

Print Co., 1 N. Dak. 434, 48 N. W. 347, 26 Am. St. Rep. 639, 12 L. R. A. 781; *Union Bank v. Laird*, 15 U. S. (2 Wheat.) 390, 4 L. ed. 269.

3. **Equity will not permit the stock to be attached as belonging to the transferor where the transferee has been diligent in his efforts to comply with the statute, and the failure to have the entry made is due to no fault of his:** *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183; *Hastings v. First Nat. Bank*, 4 Colo. App. 419, 36 Pac. 618; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

4. **Attachment of crops under mortgage.**—Attachment can not issue upon growing crops included in a chattel mortgage until payment of mortgage debt or tender thereof has been made: *Wood v. Franks*, 56 Cal. 217; *Chittenden v. Pratt*, 89 Cal. 178, 183, 26 Pac. 626. See *Rudolph v. Saunders*, 111 Cal. 233, 234, 43 Pac. 619.

5. **Money lost in gambling, where intrusted to a clerk, can not be recovered by his principal in attachment proceedings:** *Babcock v. Briggs*, 52 Cal. 502, 503.

6. **Effect of assignment.**—All that can be reached under execution or by garnishment is the right which remains in the assignor, where the assignment is made bona fide. This interest is the legal title, subject to the equitable interests of the assignee: *Wheless v. Meyer etc. Co.*, 140 Mo. App. 572, 120 S. W. 708, 714.

7. **Liability upon undertaking.**—An undertaking in attachment does not render the obligors liable for remote and possible consequences, but only for the proximate consequences naturally and ordinarily resulting from effect of writs: *Elder v. Kutner*, 97 Cal. 490, 493, 32 Pac. 563.

8. **Payee not designated in bond.**—**Effect of.**—A bond given by interveners upon an order of sale enforcing an attachment lien, which order of sale and bond were directed to the sheriff, the bond designating no payee, but naming the party for whose security the obligation was to be executed, has been upheld as a good common-law bond: *Elchoff v. Tidball*, 61 Tex. 421, 423, (form of the bond set out in the report of the case).

9. **Liability of sheriff.**—It is the duty of the sheriff, when he receives instructions, to release the levy and to return

the goods to the defendant or to his agent; and the sheriff and his sureties are responsible to the owner of the goods for their value in case he fails to do so, or in case he turns them over to some person not authorized to receive the same, although, by misapprehension, he, the sheriff, believed that such person was the agent of the defendant: *Levy v. McDowell*, 45 Texas 220, 226.

10. **Security for indebtedness.—Omission of statement.**—An affidavit for attachment is insufficient where it proceeds to follow the language of the statute and omits one of the important elements which the statute provides that it must contain. Under this rule, it has been held that where the statute provides that the affidavit shall state, among other things, that the indebtedness or demand "has not been secured by * * * any mortgage or lien upon real or personal property, or any pledge of personal property," an omission of the provision that the debt was not secured by "any pledge of personal property," or any substantially equivalent expression, is fatal to the affidavit: *Knutsen v. Phillips*, 16 Idaho 267, 101 Pac. 596, 598.

11. A contrary, and perhaps a better, doctrine than that declared upon in *Knutsen v. Phillips*, 16 Idaho 267, 101 Pac. 596, is that a declaration that the affiant has no lien upon personal property is sufficient to negative all possibility of his having a pledge; for if he had any pledge of personal property, he must have had a lien upon it: *Glidden v. Whittier*, 46 Fed. (C. C.) 437; *O'Connor v. Witherby*, 112 Cal. 38, 44 Pac. 340.

12. **Interest not required to be stated.**—It is not a material objection to an affidavit for attachment that it does not state the amount of interest due upon plaintiff's demand, where the principal sum is stated: *Wright v. Ragland*, 18 Tex. 289, 292.

13. **Defense of estoppel in relation to attachment proceedings.**

[Title of court and cause.]

[It has been held that the following paragraphs in an answer set forth facts by averment sufficient to constitute an estoppel if established on the trial, and that therefore it was error to sustain a demurrer thereto: *Ashley v. Pick*, 53 Ore. 410, 100 Pac. 1103.]

[After introductory averments the answer proceeds:]

(5) That afterwards, to wit, on the 1st day of May, 1907, in a civil action for recovery of money then pending in the justice court, Portland District, Multnomah County, state of Oregon, wherein D. H. Smith was plaintiff and said A. J. Parrington and Olive Parrington, his wife, were defendants, a writ of attachment was duly issued, commanding the constable of said district, of the personal property of said defendant to attach and safely keep to satisfy the demands of plaintiff in said action, together with the costs and expenses thereof. That under and pursuant to said writ all the property described in said complaint, and so received by this defendant, was duly attached and levied upon as the property of said defendants in said action. That afterwards, and on the 6th day of June, 1907, said court having jurisdiction over said defendant and the subject-matter of said action, rendered a judgment therein in favor of plaintiff, and against said defendant, and all of said attached property was by the order of said court directed to be sold to satisfy said judgment. That, pursuant to such order and judgment of said court, the constable of said district did on or about the 22d day of June, 1907, take from the possession of this defendant all of said personal property, and pursuant to said judgment and order of sale, after having duly advertised the same, sold all said personal property to satisfy the judgment so rendered by said court in such action against said defendants, A. J. Parrington and wife.

(6) Further answering, defendant avers that he had no knowledge or any information of any sale, assignment, or transfer of the receipt so issued by him for the personal property so received from said A. J. Parrington and wife, prior to the said 27th day of July, 1907, and long after the attachment levy upon and sale of said personal property; that said plaintiffs knew and were well aware that all of said personal property was so attached and levied upon as the property of said A. J. Parrington and wife, and was being advertised and sold as such; that the place of business of plaintiffs is in the same vicinity as that of defendant, and, during all the while said property so sold under attachment was being advertised and sold to satisfy the judgment against said Parrington and wife, the said plaintiffs, being

fully advised thereof, acquiesced therein, and did not then or ever prior to such sale make any claim of ownership or of any interest in said personal property, or cause any information to be given to this defendant that they had or claimed the same, or any interest therein; that solely by reason of such acquiescence of plaintiffs in the proceedings then being had to subject said property to the payment of said judgment, and the lack of any knowledge or information that plaintiffs claimed said property or any interest therein, this defendant took no appeal from the order and judgment of said court directing the sale of said property, or any steps to enjoin the constable of said district from taking possession of said property under said writ, and this defendant alleges that, by reason of the acquiescence of plaintiffs on such levy and sale of said property, the plaintiffs are now estopped from making claim thereto.

[Prayer.] John M. Gearin,
Attorney for defendant.

[Verification.]

14. Intervention is uniformly allowed in favor of the owner of attached goods: *Letchford v. Jacobs*, 17 La. Ann. 79; *Dennis v. Kolm*, 181 Cal. 91, 63 Pac. 141; *Potlatch L. Co. v. Runkel*, 16 Idaho 192, 101 Pac. 396, 398, 23 L. R. A. (N. S.) 536; *Taylor v. Adair*, 22 Iowa 279.

15. One who claims to be the owner of attached property, or to have a lien on it by mortgage, attachment, or otherwise, is entitled to intervene in an action where the property has been attached as being the property of another party: *Potlatch L. Co. v. Runkel*, 16 Idaho 192, 101 Pac. 396, 398, 23 L. R. A. (N. S.) 536.

16. If intervention were not allowed in favor of the owner of attached property, it would seem that it would be necessary for the owner to prosecute his action to remove the cloud of the attachment, unless the plaintiff in the action should voluntarily relinquish his claim. It is for just such a case, and for the purpose of preventing circuitry and multiplicity of actions, that the statute authorizing intervention by strangers was enacted: *Potlatch L. Co. v. Runkel*, 16 Idaho 192, 101 Pac. 396, 398, 23 L. R. A. (N. S.) 536; *Pittock v. Buck*, 15 Idaho 47, 96 Pac. 212; *Pence v.*

Sweeney, 3 Idaho (Hasb.) 181, 28 Pac. 413; *Gold Hunter M. & S. Co. v. Holliman*, 3 Idaho (Hasb.) 99, 27 Pac. 413.

17. A junior attaching creditor may intervene in the action of a senior attaching creditor for the purpose of testing the validity of the first attachment: *McComb v. Reed*, 28 Cal. 281, 87 Am. Dec. 115; *Coghill v. Marks*, 29 Cal. 673; *Stich v. Dickenson*, 38 Cal. 608; *Kimball v. Richardson-Kimball Co.*, 111 Cal. 386, 43 Pac. 1111; *McEldowney v. Madden*, 124 Cal. 108, 56 Pac. 783.

18. Texas practice as to intervention.—Under the Texas practice, a third party, as owner or claimant of the property attached, may not intervene in the same case for the purpose of asserting his right, for the reason that, in such cases, the subject-matter of the suit is the debt to be collected, and the ownership of the property is in no way put in issue by the pleadings in the case, and therefore forms no part of the subject-matter of the action: *Williams v. Bailey* (Tex. Civ. App.), 29 S. W. 834; *Rodriguez v. Trevino*, 54 Tex. 198; *Meyer v. Sligh*, 81 Tex. 336, 16 S. W. 1022.

19. Interplea in attachment.—An interplea under the statute requiring that any person before the sale of attached property, or before the payment of the proceeds thereof to the plaintiff, may present his verified complaint to the court disputing the validity of the attachment or stating his claim to the property or an interest therein, must be read in connection with the code sections which say "no objection shall be taken after judgment to any pleading for want of, or defect in, the verification": *Burke v. Sharp*, 88 Ark. 433, 115 S. W. 145, 148, citing Ark. Civ. Code, §§ 159, 257, and Kirby's Digest, §§ 391, 6152, 6182.

20. Judgment against a garnishee can not lawfully be rendered until judgment has been rendered against the defendant in the main action: *Norman v. Poole*, 70 Ark. 127, 66 S. W. 433.

21. But where that judgment has been rendered, and can not be enforced on account of failure to comply with the statutes, such failure should be set up by the garnishee as a defense: *St. Louis etc. R. Co. v. McDermitt*, 91 Ark. 112, 120 S. W. 831, 833.

CHAPTER CXXV.

Receivers.

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§ 434. CODE PROVISIONS.

Receiver—When and in what cases appointed.

California, § 564. A receiver may be appointed by the court in which an action is pending, or by the judge thereof:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of the plaintiff, or of any party whose right to or interest in the property or fund, or the proceeds thereof, is probable, and where it is shown that the property or fund is in danger of being lost, removed, or materially injured;
2. In an action by a mortgagee for the foreclosure of his mortgage and sale of the mortgaged property, where it appears that the mortgaged property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt;
3. After judgment, to carry the judgment into effect;
4. After judgment, to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or in proceedings in aid of execution, when an execution has been returned

unsatisfied, or when the judgment debtor refuses to apply his property in satisfaction of the judgment;

5. In the cases when a corporation has been dissolved, or is insolvent, or in imminent danger of insolvency, or has forfeited its corporate rights;

6. In all other cases where receivers have heretofore been appointed by the usages of courts of equity. (Kerr's Cyc. Code Civ. Proc.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Alaska, Ann. Codes 1907, C. C. P. (Carter), § 753. • Arizona, Rev. Stats. 1901, § 1532. • Arkansas, Dig. of Stats. 1904 (Kirby), §§ 6342, 6353, 6354. • Colorado, Rev. Stats. 1908, C. C. P. § 179. • Idaho, Rev. Codes 1909, § 4329. • Iowa, Ann. Code 1897, § 3822. • Kansas, Gen. Stats. 1905 (Dassler), § 5149. • Minnesota, Rev. Laws 1905, § 4262. • Missouri, Ann. Stats. 1906, § 753. Montana, Rev. Codes 1907, § 6698. • Nebraska, Comp. Stats. Ann. 1909, § 6816; Ann. Stats. 1909 (Cobbey), § 1248. • Nevada, Comp. Laws Ann. 1900 (Cutting), § 3241. • North Dakota, Rev. Codes 1905, § 6989. • Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 4441; Comp. Laws 1909 (Snyder), § 5772. • Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 1081. South Dakota, Rev. Codes 1903, C. C. P. § 227. • Texas, Civ. Stats. 1897 (Sayles), Art. 1465. Utah, Comp. Laws 1907, § 3114. • Washington, Code 1910 (Rem. & Bal.), § 741. • Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2787. • Wyoming, Rev. Stats. 1899, § 4054.

• Alaska, § 753. A receiver may be appointed in any civil action, or proceeding, other than an action for the recovery of specific personal property—

First. Provisionally, before judgment, on the application of either party, when his right to the property which is the subject of the action, or proceeding, and which is in the possession of an adverse party, is probable, and the property or its rents or profits are in danger of being lost or materially injured or impaired;

Second. After judgment, to carry the same into effect;

Third. To dispose of the property according to the judgment, or to preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the debtor refuses to apply his property in satisfaction of the judgment or decree;

Fourth. In cases provided in this code, or by other statutes, when a corporation has been dissolved or is insolvent, or in imminent danger of in-

solveny, or has forfeited its corporate rights;

Fifth. In the cases when a debtor has been declared insolvent.

• Arizona, § 1532. Judges of the district courts, in term time or in vacation, may appoint a receiver in suits pending in said courts, when no other adequate remedy is given by law for the protection and preservation of property, or the rights of parties therein pending litigation in respect thereto.

c1 Arkansas, § 6342. Whenever it shall not be forbidden by law, and shall be deemed fair and proper in any case in equity, the court, judge or chancellor shall appoint some prudent and discreet person as receiver. * * *

c2 Arkansas, § 6353, substantially same as sub. 1, Cal. C. C. P. § 564, except add at the end, "the court may appoint a receiver to take charge thereof during the pendency of the action, and may order and coerce the delivery of it to him."

c Arkansas, § 6854, substantially same as sub. 2, Cal. C. C. P. § 564.

d Colorado, C. C. P. § 179. A receiver may be appointed by the court in which the action is pending, or by a judge thereof, or, pending proceedings in the supreme court upon appeal or writ of error, by the court from whose final judgment such appellant proceedings are prosecuted, or by the judge of such court: First, before judgment, provisionally, on application of either party, when he establishes a prima facie right to the property, or to an interest in the property, which is the subject of the action, and which is in possession of an adverse party, and the property, or its rents and profits, are in danger of being lost, or materially injured or impaired. Second, after judgment to dispose of the property according to the judgment, or to preserve it during the pending of an appeal; and third, in such other cases as are in accordance with the practice of courts of equity jurisdiction.

e Idaho, § 4829, substantially same as Cal. C. C. P. § 564, except in the opening passage in line two after "pending" insert "or has passed to judgment." (Amended Mch. 5, 1909, Session Laws 1909, p. 26.)

f Iowa, § 3822. On the petition of either party to a civil action or proceeding, wherein he shows that he has a probable right to, or interest in, any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court or judge shall prescribe, the court, or, in vacation, the judge thereof, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and coerce the delivery of it to him. Upon the hearing of the application, affidavits, and such other proof as the court or judge permits, may be introduced, and upon the whole case such order made as will be for the best interest of all parties concerned.

g Kansas, § 5149. A receiver may be appointed by the supreme court, the district court, or any judge of either, or in

the absence of said judges from the county, by the probate judge:

[Subs. 1 to 6, inclusive, substantially same as Cal. C. C. P. § 564.] (Amended Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 266.)

h Minnesota, § 4262. A receiver may be appointed in the following cases:

1. Before judgment, on the application of any party to the action who shall show an apparent right to property which is the subject of such action and is in the possession of an adverse party, and the property, or its rents and profits, are in danger of loss or material impairment, except in cases wherein judgment upon failure to answer may be had without application to the court.

2. By the judgment, or after judgment, to carry the same into effect, or to preserve the property pending an appeal, or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment.

3. In the cases provided by law, when a corporation is dissolved, or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights; and, in like cases, of the property within this state of foreign corporations.

4. In such other cases as are now provided by law, or are in accordance with the existing practice, except as otherwise prescribed in this section.

i Missouri, § 753. The court, or any judge thereof in vacation, shall have power to appoint a receiver, whenever such appointment shall be deemed necessary, whose duty it shall be to keep and preserve any money or other thing deposited in court, or that may be the subject of a tender, and to keep and preserve all property and protect any business or business interest intrusted to him pending any legal or equitable proceeding concerning the same, subject to the order of court.

j Nebraska, § 6816. A receiver may be appointed by the supreme court, or the district court, or by the judge of either, in the following cases: First, in an action by a vendor to vacate a fraudulent purchase of property, or by a creditor to subject any property or fund to his claim, or between partners or others jointly owning or interested in any property or fund, on the application of any party to suit, when the property or fund is in danger of being lost, removed, or

materially injured; second, in an action for the foreclosure of a mortgage, when the mortgaged property is in danger of being lost, removed, or materially injured, or is probably insufficient to discharge the mortgage debt; third, after judgment, or decree to carry the same into execution, or to dispose of the property according to the decree or judgment, or to preserve it during the pendency of an appeal; fourth, in all cases provided for by special statutes; fifth, in all other cases where receivers have heretofore been appointed by the usages of courts of equity.

k Nevada, § 3241. A receiver may be appointed by the court in which the action is pending, or by a judge thereof: First, before judgment, provisionally, on the application of either party, when he establishes a prima facie right to the property, or an interest in the property which is the subject of the action, and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially injured or impaired; second, after judgment to dispose of the property according to the judgment, or to preserve it during the pendency of an appeal; and, third, in such other cases as are in accordance with the practice of courts of equity jurisdiction.

l North Dakota, § 6989, substantially same as Cal. C. C. P. § 564, except in sub. 5, line one after "cases" insert "provided in this code"; and also at the end of sub. 5, add "and in like cases within this state, of foreign corporations."

m Oklahoma, § 4441, opening passage same as Kansas § 5149, remainder substantially same as subs. 1 to 6 inclusive, Cal. C. C. P. § 564.

n Oregon, § 1081, substantially same as Alaska C. C. P. § 753.

o Texas, Art. 1465, substantially same as Cal. C. C. P. § 564, except substitute for the opening passage the words "Receivers may be appointed by any judge of a court of competent jurisdiction in this state in the following cases"; also omit subs. 3 and 4 of Cal. C. C. P. § 564, and renumber subs. 5 and 6 to 3 and 4 respectively.

p Washington, § 741. A receiver may be appointed by the court in the following cases:

1. In an action by a vendor to vacate a fraudulent purchase of property, or by

a creditor to subject any property or fund to his claim;

2. In an action between partners, or other persons jointly interested in any property or fund;

3. In all actions where it is shown that the property, fund, or rents and profits in controversy are in danger of being lost, removed, or materially injured;

4. In an action by a mortgagee for the foreclosure of a mortgage and the sale of the mortgaged property, when it appears that such property is in danger of being lost, removed, or materially injured; or when such property is insufficient to discharge of the debt, to secure the application of the rents and profits accruing, before a sale can be had;

5. When a corporation has been dissolved or is insolvent, or is in imminent danger of insolvency, or has forfeited its corporate rights;

6. And in such other cases as may be provided for by law, or when, in the discretion of the court, it may be necessary to secure ample justice to the parties; provided, that no party or attorney or other person interested in an action shall be appointed receiver therein.

q Wisconsin, § 2787. A receiver may be appointed:

1. Before judgment, on the application of either party, when he establishes an apparent right to or interest in property which is the subject of the action and which is in the possession of an adverse party, and the property or its rents and profits are in danger of being lost or materially impaired.

2. By the judgment, or after judgment, to carry the judgment into effect or to dispose of the property according to the judgment.

3. After judgment, to preserve the property during the pendency of an appeal; or when an execution has been returned unsatisfied and the judgment debtor refuses to apply his property in satisfaction of the judgment or in an action by a creditor under section 3029.

4. In cases provided by any statute when a corporation has been dissolved or is insolvent or in imminent danger of insolvency, or has forfeited its corporate rights.

5. In such cases as are now provided by law or may be in accordance with the existing practice except as otherwise provided in this chapter.

r Wyoming, § 4054. A receiver may be appointed by the district court or by a judge thereof, in the following cases:

[Subs. 1, 2 and 3 same as corresponding sub-divisions in Cal. C. C. P. § 564.]

4. After judgment, to dispose of the property according to the judgment or preserve it during the pendency of an appeal, or when an execution has been returned unsatisfied, and the judgment

debtor refuses to apply the property in satisfaction of the judgment.

5. In the cases provided in this division, and by special statute, when a corporation has been dissolved or is insolvent or in imminent danger of insolvency or has forfeited its corporate rights.

6. [Same as sub. 6 in Cal. C. C. P. § 564.]

§ 435. PETITIONS AND ORDERS FOR LEAVE TO SUE.

FORM No. 1041—Petition for leave to sue a receiver.

[Title of court and cause.]

To the court for County:

1. The petition of respectfully shows to the court that on the day of , 19 , was, by an order of this court duly given and made, appointed receiver of the property and effects of , in an action then pending in this court [here state briefly the nature of the action]; that thereafter said duly qualified as such, and that he is now the duly qualified and acting receiver in said matter.

2. That said receiver has now in his possession, claiming title thereto as such receiver, certain property [here describe the same]; that your petitioner is in fact the owner of such property, but that his title thereto is denied by the said receiver.

3. That your petitioner has demanded of said receiver that he deliver up the said property to your petitioner, but that said receiver refuses so to do.

4. That your petitioner has fully and fairly stated the case [or all the facts] to , his counsel, whose address is at , and upon such statement he is advised by his said counsel, and verily believes, that he has a good and substantial cause of action against the said receiver to recover possession of said property. [Or state any other cause of action existing in favor of the petitioner and against said receiver.]

Wherefore, your petitioner prays that leave may be granted to him to bring an action in the court for the county of , against said receiver, to recover the said property [or state the relief prayed for in the action], and for such other relief thereupon as to the court may seem just.

[Signature.]

[Verification as in case of a pleading, where required.]

FORM No. 1042—Certificate of attorney as to merits.

I, _____, attorney for said petitioner, do hereby certify that I have examined [or know of my own knowledge] all the facts set forth in the foregoing petition, and that in my opinion the petitioner has a valid and meritorious cause of action thereon.

A. B., Attorney for D. E., Receiver, etc.

FORM No. 1043—Order granting leave to sue a receiver.

[Title of court and cause.]

The petition of _____, having come on to be heard before this court, _____ appearing for the said petitioner, and _____ appearing for the said receiver [or, no one appearing in opposition], and the court being now fully advised in the premises:

It is ordered, that leave be and the same is hereby granted to the said _____ to sue said receiver, as prayed in said petition.

By the court.

[Date.]

S. T., Judge.

FORM No. 1044—Petition of receiver for leave to sue.

[Title of court.]

In the matter of the application
of _____, as receiver of _____,
for leave to bring an action
against _____. [Or the applica-
tion may be under the title in
the action or proceeding in
which the receiver was ap-
pointed.]

To the _____ court of the state of _____, in and for the county of _____:

Your petitioner herein, _____, as receiver of _____, respectfully shows:

1. That on the _____ day of _____, 19____, by order duly given, made, and entered in the _____ court, your petitioner was duly appointed receiver of [here state the facts relating to the appointment of the receiver]; that thereafter your petitioner qualified as such, and that he is now the duly appointed, qualified, and acting receiver in said matter.

2. That your petitioner is advised, and verily believes, that he, as such receiver, has a good cause of action against _____, by reason of the following facts: [Here state concisely, in the form of a complaint, the facts constituting the cause of action.]

3. That your petitioner, upon diligent inquiry, is informed and believes, and, upon such information and belief, alleges, that the said _____ is solvent, and that the said claim is collectable from him by means of an action [or otherwise indicate to the court why the action, if prosecuted, will be of advantage to the estate represented by the receiver].

4. That your petitioner has sufficient property of said estate, consisting of [here specify what property is in the receiver's hands], to secure the said _____ for any costs which he may recover from your petitioner if such action is unsuccessful. [If the receiver was appointed in supplementary proceedings, state that this application is presented at the instance of a creditor, and aver a written request of such creditor, where required by statute, that said action be brought, and annex such request.]

5. [Add, if this application is the first made:] That no previous application for such leave has been made.

Wherefore, your petitioner prays for leave to bring an action as such receiver in the _____ court against the said _____, on the cause of action hereinbefore stated.

Dated _____, 19__.

_____, Receiver, etc., petitioner.

A. B., Attorney for receiver.

[Verification in the form required for a complaint.]

FORM No. 1045—Order authorizing receiver to sue.

[Title of court and cause, etc.]

On reading and filing the verified petition of _____, receiver for _____, asking for leave to bring an action against _____ on the following cause of action: [Here state briefly the nature of the action]; and on due proof of proper service of a notice of motion upon this application on [here state persons on whom notices of motion were served, if any], and after hearing _____, attorney for said receiver, in favor of said motion, and _____, attorney for _____, in opposition thereto [if any opposition is made], and the court

being satisfied that the receiver ought to be authorized to bring such action:

Now, on motion of _____, attorney for said receiver, it is hereby ordered, that said _____, as such receiver, be and he is hereby authorized and directed to commence and prosecute an action in such court as he may be advised by his counsel, against the said _____, to recover upon said [here state the debt or demand to be sued upon], and such other and further relief therein as may be proper.

[If security for costs is required, add a provision to that effect; or if the receiver has sufficient funds in his hands to pay such costs, add, where permitted by statute or by rule of court, that security for costs is dispensed with by reason of the fact that the receiver has sufficient to pay such costs.]

Dated _____, 19 ____.

S. T., Judge.

§ 436. COMPLAINTS [OR PETITIONS].

FORM No. 1046—By a receiver appointed by a court in an action.

[Title of court.]

John Doe, as receiver [etc.],
 plaintiff,
 v.
 Richard Roe, defendant.

The plaintiff complains of the defendant, and alleges:

1. [State the original cause of action.]

2. That on the _____ day of _____, 19 ____, at _____, the plaintiff was, by an order duly given and made in the _____ court of the county of _____, state of _____, in a certain action then pending between A. B., plaintiff, and C. D., defendant, numbered _____, appointed receiver of [state the property, so as to include that involved in the present cause of action].

3. That on the same day [or on the _____ day of _____, 19 ____,] he duly qualified as, and now is, such receiver.

4. That [plaintiff demanded payment of said _____, but] defendant has not paid the same, nor any part thereof.

[Concluding part.]

FORM No. 1047—By receiver of a mining corporation to recover assets belonging thereto.

(Modified to meet suggestions in the opinion: *Allen v. Baxter*, 42 Wash. 434; 85 Pac. 26.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That the De Soto Placer Mining Company is a foreign corporation, organized under the laws of the state of West Virginia, and authorized to transact business in the state of Washington.

2. That during all the times hereinafter mentioned, and until the appointment of a receiver, the said corporation was maintaining an office in the city of Seattle, King County, Washington, where service could be had upon the said corporation.

3. That on the 29th day of March, 1904, the defendant herein, Marion B. Baxter, filed her complaint in this court against the said De Soto Placer Mining Company as defendant, which said action is docketed and numbered as No. 42,347, wherein she is to recover from the said defendant for services rendered, the sum of \$3,000.

4. That afterwards, to wit, on March 30, 1904, a writ of attachment against the certain property of the said De Soto Placer Mining Company hereinafter described was sued out, and issued and directed to Frank P. Brewer, sheriff of Snohomish County, Washington, for service; that the said Frank P. Brewer, as said sheriff, made service of the said writ of attachment by filing the same with the auditor of the said Snohomish County; that the said De Soto Placer Mining Company duly entered its appearance by general denial in the said action.

5. That afterwards, to wit, on the 20th day of October, 1904, judgment was rendered in favor of the said Marion D. Baxter and against the said De Soto Placer Mining Company in the sum of \$3,000, with interest.

6. That on the 20th day of October, 1904, a writ of execution against the property hereinafter described was issued out of this court and directed to the said Frank P. Brewer, as sheriff of the said Snohomish County, for execution, and service of said writ was made by filing the same with the auditor of said county.

7. That on the 23d day of July, 1904, one Arthur G. Mather was regularly appointed as receiver for all the property and assets of the said De Soto Placer Mining Company, in an action wherein one

Louis L. Lang was plaintiff, and the said De Soto Placer Mining Company was defendant.

8. That afterwards, to wit, on the day of November, 1904, the said Arthur G. Mather was, at his own request, removed as said receiver, and the plaintiff herein was, on the 16th day of November, 1904, by order of the Hon. George E. Morris, judge of the said superior court of King County, Washington, appointed as receiver of the property and assets of the said De Soto Placer Mining Company.

9. That the plaintiff before the commencement of this action duly made and filed his oath and qualified as such receiver, and that he is now, and during all the times since said last-named date has been, the duly qualified and acting receiver of the said De Soto Placer Mining Company.

10. That at the time of the filing of the suit of the said Marion B. Baxter against the said De Soto Placer Mining Company, and at the time of the issue and service of the writ of attachment thereunder, and at the time of the issue and service of the writ of execution and the judgment obtained in said suit, the said De Soto Placer Mining Company was wholly insolvent.

11. That prior to all the dates hereinbefore mentioned, to wit, on or before the month of November in the year 1903, practically all of the real estate and personal property of the said company had been conveyed, transferred, and leased to the said company.

12. That the debts and liabilities due from the said company to its creditors at the time of the filing of the said Marion B. Baxter's complaint aggregated approximately the sum of \$90,000, and the property and assets at that time belonging to the said company did not then exceed in value, and do not now exceed in value, the sum of \$10,000, including the property hereinafter described; that the following is a description of the property attached and levied upon in the proceedings commenced by the said Marion B. Baxter aforesaid, to wit: [Then follows a long list of real property and mining claims located in Snohomish County, Washington.]

13. That the said Frank P. Brewer, as sheriff of Snohomish County, is authorized to sell the property hereinbefore described in the said writ of attachment under said execution.

14. That there is little or no property of the said company; that should sale be made of the property hereinbefore described, and proceeds thereof appropriated, the said Marion B. Baxter will receive

approximately the full amount of her claim against the said company, while the other creditors herein will take nothing.

Wherefore, the plaintiff prays: That the claim of the said Marion B. Baxter be declared a general claim against the said corporation; that the levy under the writ of attachment and the levy of the writ of execution sued out by these defendants be dissolved and set aside; that the property herein be given into the control of the receiver as an asset of the said corporation; and that the plaintiff, as such receiver, be given judgment for his costs herein incurred.

Byers & Byers, and
Clay Allen,

[Verification.]

Attorneys for plaintiff

FORM No. 1048—Action against a receiver.

[Title of court.]

John Doe, plaintiff,

v.

Richard Roe, as receiver

[state in what case and
of what], defendant.

The plaintiff complains of the defendant, and alleges:

1. [State the cause of action.]
2. That the defendant is the receiver, duly appointed, qualified, and acting, in [state what case and of what].
3. [Here allege that leave to sue the receiver upon said cause of action was, upon due application to the court, granted.]
4. That [plaintiff demanded payment of said _____, but] said sum has not been paid, nor any part thereof.

[Concluding part.]

§ 437. ANNOTATIONS.

Averment of appointment.—Where a complaint alleges that the order appointing a receiver was “duly made” by the superior court, this, under the rule of pleading declared in section 456 of the Code of Civil Procedure of California, is equivalent to an averment that all the jurisdictional prerequisites to the appointment of a receiver existed: *Title Insurance etc. Co. v. Grider*, 152 Cal. 746, 94 Pac. 601, 602, (by receiver, to recover moneys from sale of lots).

Adverse party essential to proceedings.—The provisions of the Colorado statute relating to the appointment of receivers—Code Civ. Proc., §§ 141 (subs. 1, 3), 142—are construed to be no more than a codification of the law in practice governing the appointment of receivers before their enactment; and it is evidently necessary to this jurisdiction in all these proceedings that there be an adverse party whose rights

to certain property are to be protected and adjudicated: *Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac. 272, 276.

When court may appoint receiver of its own motion.—Where an action is brought under a statute providing in itself for the appointment of a receiver, where a certain state of facts exists,—as, for example, the insolvency of a banking corporation,—the court will appoint a receiver as a part of the relief sought by the action, and this even though the pleadings offer no issue in that behalf: *People v. Bank of San Luis Obispo*, 154 Cal. 194, 203, 97 Pac. 306.

Receivers to administer affairs of corporations.—When appointment invalid.—Courts have no jurisdiction to appoint a receiver except in a suit pending in which a receiver is desired, unless empowered by statute. Under this doctrine, proceedings instituted upon the ex-parte application of a corporation for the appointment of a receiver to take charge of the property of the corporation and control and protect the same are invalid; for to permit this would be to make corporations the administrators of every estate where the owners thereof were incapable or unwilling to administer them themselves: *Jones v. Bank of Leadville*, 10 Colo. 469, 17 Pac. 272, 276. For cases illustrating the same doctrine, see *Baker v. Backus*, 32 Ill. 79; *Davis v. Flagstaff*, 2 Utah 74; *French Bank case*, 53 Cal. 495; *Kimball v. Goodburn*, 32 Mich. 10.

Collateral attack of order appointing receiver.—An order appointing a receiver can not be collaterally attacked upon any ground except of a want of jurisdiction to make it: *Title Insurance etc. Co. v. Grider*, 152 Cal. 746, 94 Pac. 601, 602, (by receiver to recover moneys from sale of lots).

For actions by and against receivers after their discharge, see note to 7 Am. & Eng. Ann. Cas. 44.

CHAPTER CXXVI.

Deposit in Court.

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§ 438. CODE PROVISIONS.

Deposit in Court.

California, § 572. When it is admitted by the pleadings, or shown upon the examination of a party to the action, that he has in his possession, or under his control, any money or other thing capable of delivery, which, being the subject of litigation, is held by him as trustee for another party, or which belongs or is due to another party, the court may order the same, upon motion, to be deposited in court or delivered to such party, upon such conditions as may be just, subject to the further direction of the court. (*Kerr's Cyc. Code Civ. Proc.* Amended March 20, 1907, Stats. and Amdts. 1907, p. 710.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Arizona, Rev. Stats. 1901, § 1528. Arkansas, Dig. of Stats. 1904 (Kirby), § 6358. Colorado, Rev. Stats. 1908, C. C. P. § 178. Hawaii, Rev. Laws 1905, § 1759. Idaho, Rev. Codes, 1909, § 4339. ^b Kansas, Gen. Stats. 1905 (Dassler), § 5154. ^c Minnesota, Rev. Laws 1905, § 4263. Montana, Rev. Codes 1907, § 6705. Nevada, Comp. Laws Ann. 1900 (Cutting), § 3240. ^d North Dakota, Rev. Codes 1905, § 6994. ^e Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 4446; Comp. Laws 1909 (Snyder), § 5777. ^f South Dakota, Rev. Codes 1903, C. C. P. § 233. Utah, Comp. Laws 1907, § 3120. ^g Washington, Code 1910 (Rem. & Bal.), § 745. ^h Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2793. ⁱ Wyoming, Rev. Stats. 1899, § 4059.

^a Arizona, § 1528, substantially same as Cal. C. C. P. § 572. (Amended Mch. 19, 1903, Laws 1903, pp. 157, 158.)

^b Kansas, § 5154, substantially same as Cal. C. C. P. § 572, except in the third line from the end, omit the words "upon motion" after "same"; and in the following line after "party" substitute for "upon such conditions as may be just" the words "with or without security." (Re-enacted Mch. 12, 1909, Laws 1909, p. 329, C. C. P. § 271.)

^c Minnesota, § 4263, substantially same as Kansas § 5154, except add at the end "If such order be disobeyed, the court may punish the disobedience as a con-

tempt, and may also require the sheriff or other proper officer to take the money or property and deposit or deliver it in accordance with the direction given."

^d North Dakota, § 6994, substantially same as Kansas § 5154.

^e Oklahoma, § 4446, substantially same as Kansas § 5154.

^f South Dakota, C. C. P. § 233, substantially same as Kansas § 5154.

^g Washington, § 745, substantially same as Kansas § 5154.

^h Wisconsin, § 2793, substantially same as Kansas § 5154.

ⁱ Wyoming, § 4059, substantially same as Kansas § 5154.

FORM No. 1049—Motion to deposit money [or other personal property] in court.

[Title of court and cause.]

Now comes _____, [defendant,] in the above-entitled action and moves the court for an order directing him, the said defendant, to deposit the sum of \$ _____ [or other personal property, describing it] in court [or with such party as may be authorized to receive the same], to abide the determination of this action: [Or state any other conditions.] Said motion is made upon the grounds that the said money [etc.] is held by defendant as trustee for _____, [or that said money (etc.) belongs to _____,] and that defendant has disclaimed in his [answer] herein any interest therein or right thereto as appears from the papers and proceedings herein.

A. B., Attorney for defendant.

FORM No. 1050—Order for deposit in court, or the delivery to another party, of money or other property.

[Title of court and cause.]

It appearing to the satisfaction of the court that has in his possession [or under his control] the sum of \$ [or the following-described personal property, to wit: (Here describe the same)], which sum [or property] is the subject of litigation in this action; that the same is held by him as trustee for , [or which belongs to, or is due to] , and that he, said , [trustee,] disclaims any interest therein [or it appearing on the examination of said that he has no interest therein]: Now, on motion of , the attorney for , it is ordered, that said deposit said money in court [or deliver the said property to , who is hereby authorized to receive the same,] upon the following conditions: [Describe them], [he, the said receiver thereof, to hold the same] subject to the further direction and orders of the court.

[Date.]

S. T., Judge.

TITLE XVI.

Compensatory and Specific Relief.

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CHAPTER CXXVII.

Damages.

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§ 439. NATURE AND EXTENT OF COMPENSATORY RELIEF.

Species of relief provided by the code.

California, § 3274. As a general rule, compensation is the relief or remedy provided by the law of this state for the violation of private rights, and the means of securing their observance; and specific and preventive relief may be given in no other cases than those specified in this part [relating to relief] of the Civil Code. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6038. North Dakota, Rev. Codes 1905, § 6554. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2721; Comp. Laws 1909 (Snyder), § 2879. South Dakota, Rev. Codes 1903, C. C. § 2284.

Person suffering detriment may recover damages.

California, § 3281. Every person who suffers detriment from the unlawful act or omission of another, may recover from the person

in fault a compensation therefor in money, which is called damages. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6040. North Dakota, Rev. Codes 1905, § 6556. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2723; Comp. Laws 1909 (Snyder), § 2881. South Dakota, Rev. Codes 1903, C. C. § 2286.

Detriment defined.

California, § 3282. Detriment is a loss or harm suffered in person or property. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6041. North Dakota, Rev. Codes 1905, § 6557. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2724; Comp. Laws 1909 (Snyder), § 2882. South Dakota, Rev. Codes 1903, C. C. § 2287.

Detriment resulting, or certain, after suit brought.

California, § 3283. Damages may be awarded, in a judicial proceeding, for detriment resulting after the commencement thereof, or certain to result in the future. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6042. North Dakota, Rev. Codes 1905, § 6558. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2725; Comp. Laws 1909 (Snyder), § 2883. South Dakota, Rev. Codes 1903, C. C. § 2288.

Value, how estimated in favor of seller.

California, § 3353. In estimating damages, the value of the property to a seller thereof is deemed to be the price which he could have obtained therefor in the market nearest to the place at which it should have been accepted by the buyer, and at such time after the breach of the contract as would have sufficed, with reasonable diligence, for the seller to effect a resale. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6084. North Dakota, Rev. Codes 1905, § 6597. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2764; Comp. Laws 1909 (Snyder), § 2922. South Dakota, Rev. Codes 1903, C. C. § 2327.

Limitation of damages.

California, § 3358. Notwithstanding the provisions of this chapter, [as to measure of damages] no person can recover a greater amount in damages for the breach of an obligation than he could

have gained by the full performance thereof on both sides, except in the cases specified in the articles on exemplary damages and penal damages, and in section thirty-three hundred and nineteen, thirty-three hundred and thirty-nine, and thirty-three hundred and forty. (Kerr's Cyc. Civ. Code.)

For sections referred to in the above section, see page 1723 (§ 3319), page 1734 (§ 3339), page 1738 (§ 3340), and page 1737 et seq., (sections relating to exemplary damages).

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6086. North Dakota, Rev. Codes 1905, § 6599. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2766; Comp. Laws 1909 (Snyder), § 2924. South Dakota, Rev. Codes 1903, C. C. § 2329.

Damages to be reasonable.

California, § 3359. Damages must, in all cases, be reasonable, and where an obligation of any kind appears to create a right to unconscionable and grossly oppressive damages, contrary to substantial justice, no more than reasonable damages can be recovered. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Montana, Rev. Codes 1907, § 6087. North Dakota, Rev. Codes 1905, § 6600. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2767; Comp. Laws 1909 (Snyder), § 2925. South Dakota, Rev. Codes 1903, C. C. § 2330. ^a Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2887.

^a Wisconsin, § 2887. Whenever damages are recoverable the plaintiff may claim and recover, if he show himself entitled thereto, any rate of damages

which he might have heretofore recovered for the same cause of action, except as provided otherwise in special cases.

Nominal damages.

California, § 3360. When a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6088. North Dakota, Rev. Codes 1905, § 6601. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2768; Comp. Laws 1909 (Snyder), § 2926. South Dakota, Rev. Codes 1903, C. C. § 2331.

§ 440. INTEREST AS DAMAGES.

Interest recoverable with damages.

California, § 3287. Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt.

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6043. North Dakota, Rev. Codes 1905, § 6559. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2726; Comp. Laws 1909 (Snyder), § 2884. South Dakota, Rev. Codes 1903, C. C. § 2289.

Interest in actions not arising from breach of contract.

California, § 3288. In an action for the breach of an obligation not arising from the contract, and in every case of oppression, fraud, or malice, interest may be given, in the discretion of the jury. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Missouri, Ann. Stats. 1906, § 2869. Montana, Rev. Codes 1907, § 6044.
 • New Mexico, Comp. Laws 1897, § 3219. North Dakota, Rev. Codes 1905, § 6560. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2727; Comp. Laws 1909 (Snyder), § 2885. South Dakota, Rev. Codes 1903, C. C. § 2290.

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| <p>• Missouri, § 2869. The jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages, in the nature of interest,</p> | <p>over and above the value of the goods at the time of the conversion or seizure. • New Mexico, § 3219, substantially same as Missouri § 2869.</p> |
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Rate stipulated by contract—When superseded.

California, § 3289. Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Arizona, Rev. Stats. 1901, § 2774. • Arkansas, Dig. of Stats. 1904 (Kirby), § 5388. • Colorado, Rev. Stats. 1908, § 3163. • Iowa, Ann. Code 1897, § 3039. • Kansas, Gen. Stats. 1905 (Dassler), § 3721. • Minnesota, Rev. Laws 1905, § 2733. • Missouri, Ann. Stats. 1906, § 3707. • Montana, Rev. Codes 1907,

§ 6045. ¹ Nebraska, Comp. Stats. Ann. 1909, § 4119; Ann. Stats. (Cobbey), § 6752. ¹ Nevada, Comp. Laws Ann. 1900 (Cutting), § 2746. ¹ New Mexico, Comp. Laws 1897, § 2551. North Dakota, Rev. Codes 1905, § 5515. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 851; Comp. Laws 1909 (Snyder), § 1158. South Dakota, Rev. Codes 1903, C. C. § 1421. ¹ Utah, Comp. Laws 1907, § 1241x9. ¹ Washington, Code 1910 (Rem. & Bal.), § 457.

^a Arizona, § 2774. In the absence of an agreement in writing, signed by the debtor, interest shall be paid at the rate of six per cent per annum on money due on any bond, bill, promissory note, or other instrument in writing, on judgments, on money lent, on the sum due on accounts stated, on the sum due from the time it is audited from the territory, any county, city or village; provided, however, a different rate of interest, not to exceed twelve per cent per annum, if agreed to in writing, signed by the payor, shall be paid. A judgment rendered on such agreement shall bear the rate of interest provided for in the agreement, and it shall be so specified in the judgment.

Any person so contracting for a greater rate of interest than twelve per cent per annum shall forfeit all interest so contracted for in excess of such twelve per cent; and in addition thereto, shall forfeit a sum of money to be deducted from the amount due for principal and lawful interest, equal to the amount of interest contracted for in excess of twelve per cent per annum.

All payments of money or property made by way of usurious interest, or of inducements to contract for more than twelve per cent per annum, whether made in advance or not, shall be deemed and taken to be payments made on account of the principal and twelve per cent per annum, and the courts shall render judgment for no greater sum than the balance found due after deducting the payments of money or property made as aforesaid. (Amended March 18, 1909, Laws 1909, p. 221.)

^b Arkansas, § 5388. Judgments or decrees upon contracts bearing more than six per cent interest shall bear the same interest as may be specified in such contracts and the rate of interest shall be expressed in such judgments and decrees and all other judgments and decrees shall bear interest at the rate of six per cent per annum until satisfaction is made; provided, no judgment rendered or to be rendered against any

county in the state on county warrants or other evidences of county indebtedness shall bear any interest after the passage of this act.

^c Colorado, § 3163. The parties to any bond, bill, promissory note, or other instrument of writing, may stipulate therein for the payment of a greater or higher rate of interest than eight per centum per annum, and any such stipulation may be enforced in any court of competent jurisdiction in the state.

^d Iowa, § 3039. Interest shall be allowed on all money due on judgments and decrees of courts at the rate of six cents on the hundred by the year, unless a different rate is fixed by the contract on which the judgment or decree is rendered, in which case the judgment or decree shall draw interest at the rate expressed in the contract, not exceeding eight cents on the hundred by the year, which rate must be expressed in the judgment or decree.

^e Kansas, § 3721. When a rate of interest is specified in any contract, that rate shall continue until full payment is made, and any judgment rendered on any such contract shall bear the same rate of interest mentioned in the contract, which rate shall be specified in the judgment; but in no case shall such rate exceed ten per cent per annum, and any bond, note bill, or other contract for the payment of money, which in effect provides that any interest or any higher rate of interest shall accrue as a penalty for any default, shall be void as to any such provision.

^f Minnesota, § 2733. The interest for any legal indebtedness shall be at the rate of six dollars upon one hundred dollars for a year, unless a different rate is contracted for in writing; and no person shall directly or indirectly take or receive in money, goods, or things in action, or in any other way, any greater sum, or any greater value, for the loan or forbearance of money, goods, or things in action, than ten dollars on one hundred dollars for one year; and in the

computation of interest upon any bond, note, or other instrument or agreement interest shall not be compounded, but any contract to pay interest, not usurious, upon interest overdue, shall not be construed to be usury. Contracts shall bear the same rate of interest after they become due as before, and any provision in any contract, note, or instrument providing for an increase of the rate of interest after maturity, or any increase therein after making and delivery, shall work a forfeiture of the entire interest; but this provision shall not apply to notes or contracts which bear no interest before maturity.

g Missouri, § 3707. Interest shall be allowed on all money due upon any judgment or order of any court, from the day of rendering the same until satisfaction be made by payment, accord or sale of property; all such judgments and orders for money upon contracts bearing more than six per cent interest shall bear the same interest borne by such contracts, and all other judgments and orders for money shall bear six per cent per annum until satisfaction made, as aforesaid.

h Montana, § 6045, substantially same as Cal. Civ. Code § 3289, except in the last line after "verdict" the word "or" is printed "of."

i Nebraska, § 4119. Interest on all decrees and judgments for the payment of money shall be from the date of the rendition thereof at the rate of seven dollars upon each one hundred dollars annually until the same shall be paid; provided, that if said judgment or decree shall be founded upon any contract, either verbal or written, by the terms of which a greater rate of interest, not exceeding the amount allowed by law, than

seven per centum shall have been agreed upon, the rate of interest upon such judgment or decree shall be the same as provided for by the terms of the contract upon which the same was founded.

j Nevada, § 2746. Parties may agree, in writing, for the payment of any rate of interest whatever on money due, or to become due, on any contract. Any judgment rendered on such contract, shall conform thereto, and shall bear the interest agreed upon by the parties, and which shall be specified in the judgment; provided, only the amount of the original claim or demand shall draw interest after judgment.

k New Mexico, § 2551. Judgments and decrees for the payment of money shall draw the same rate of interest with the contract on which they are rendered, and such rate, if other than six per cent shall be expressed in the judgment or decree, but no judgment or decree shall draw more than twelve per cent interest.

l Utah, § 1241x9. Any judgment rendered on a lawful contract shall conform thereto and shall bear the interest agreed upon by the parties, which shall be specified in the judgment; other judgments shall bear interest at the rate of eight per cent per annum, which shall be specified in the judgment.

m Washington, § 457. Judgments hereafter rendered founded on written contracts, providing for the payment of interest until paid at a specified rate, shall bear interest at the rate specified in such contracts, not in any case, however, to exceed ten per cent per annum: Provided, that said interest rate is set forth in the judgment; and all other judgments shall bear interest at the rate of six per centum per annum from date of entry thereof.

Acceptance of principal waives claim to interest.

California, § 3290. Accepting payment of the whole principal, as such, waives all claim to interest. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Montana, Rev. Codes 1907, § 6046. • North Dakota, Rev. Codes 1905, § 6561. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2728; Comp. Laws 1909 (Snyder), § 2886. South Dakota, Rev. Codes 1903, C. C. § 2291.

^a North Dakota, § 6561, substantially same as Cal. Civ. Code § 3290, except at the end after "interest" add "unless interest is expressly provided for in the contract."

§ 441. DAMAGES FOR BREACH OF CONTRACTS, GENERALLY.

Measure of damages for breach of contract.

California, § 3300. For the breach of an obligation arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate the party aggrieved for all the detriment proximately caused thereby, or which, in the ordinary course of things, would be likely to result therefrom. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Hawaii, Rev. Laws 1905, § 1745. ^b Montana, Rev. Codes 1907, § 6048.
^b North Dakota, Rev. Codes 1905, § 6563. ^c Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2730; Comp. Laws 1909 (Snyder), § 2888. ^d South Dakota, Rev. Codes 1903, C. C. § 2293.

^a Hawaii, § 1745. The measure of damages in all cases contemplated by section 1712, shall be according to the true legal interpretation of the court upon the law, instrument, contract or agreement; and in all cases of injury, direct or consequential, to the plaintiff in person, or his wife, child or servant, or to his, her, or their character or feelings, or to his

property, real or personal, the measure of damages shall be determined by the jury.

^b North Dakota, § 6563, first sentence same as Cal. Civ. Code § 3300.

^c Oklahoma, § 2730, first sentence substantially same as Cal. Civ. Code § 3300.

^d South Dakota, Civ. Code § 2293, first sentence same as Cal. Civ. Code § 3300.

Damages must be ascertainable.

California, § 3301. No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Montana, Rev. Codes 1907, § 6049. ^a North Dakota, Rev. Codes 1905, § 6563.
^b Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2730; Comp. Laws 1909 (Snyder), § 2888. ^c South Dakota, Rev. Codes 1903, C. C. § 2293.

^a North Dakota, § 6563, last sentence same as Cal. Civ. Code § 3301.

^b Oklahoma, § 2730, last sentence same as Cal. Civ. Code § 3301.

^c South Dakota, C. C. 2293, last sentence same as Cal. Civ. Code § 3301.

Detriment for breach of obligation to pay money.

California, § 3302. The detriment caused by the breach of an obligation to pay money only, is deemed to be the amount due by the terms of the obligation, with interest thereon. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745.** **Montana, Rev. Codes 1907, § 6050.** **North Dakota, Rev. Codes 1905, § 6564.** **Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2731; Comp. Laws 1909 (Snyder), § 2889.** **South Dakota, Rev. Codes 1903, C. C. § 2294.**

• **Hawaii, § 1745, see note • to Cal. Civ. Code § 3300, page 1722.**

Breach of warranty of agent's authority.

California, § 3318. The detriment caused by the breach of a warranty of an agent's authority, is deemed to be the amount which could have been recovered and collected from his principal if the warranty had been complied with, and the reasonable expenses of legal proceedings taken, in good faith, to enforce the act of the agent against his principal. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745.** **Montana, Rev. Codes 1907, § 6066.** **North Dakota, Rev. Codes 1905, § 6580.** **Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2747; Comp. Laws 1909 (Snyder), § 2905.** **South Dakota, Rev. Codes 1903, C. C. § 2310.**

• **Hawaii, § 1745, see note • to Cal. Civ. Code § 3300, page 1722.**

Breach of promise of marriage.

California, § 3319. The damages for the breach of a promise of marriage rest in the sound discretion of the jury. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745.** • **Montana, Rev. Codes 1907, § 6067.** **North Dakota, Rev. Codes 1905, § 6581.** **Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2748; Comp. Laws 1909 (Snyder), § 2906.** **South Dakota, Rev. Codes 1903, C. C. § 2311.**

^a Hawaii, § 1745, see note ^a to Cal. Civ. Code § 3300, p. 1722.

^b Montana, § 6067, substantially same as Cal. Civ. Code § 3319, except in the last line after discretion "of" is printed "for."

§ 442. DAMAGES FOR BREACH OF CARRIERS' OBLIGATIONS.

Breach of carrier's obligation to accept freight, passengers, etc.

California, § 3315. The detriment caused by the breach of a carrier's obligation to accept freight, messages, or passengers, is deemed to be the difference between the amount which he had a right to charge for the carriage and the amount which it would be necessary to pay for the same service when it ought to be performed. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6063. North Dakota, Rev. Codes 1905, § 6577. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2744; Comp. Laws 1909 (Snyder), § 2902. South Dakota, Rev. Codes 1903, C. C. § 2307. ^b Texas, Civ. Stats. 1897 (Sayles), Art. 321.

^a Hawaii, § 1745, see note ^a to Cal. Civ. Code § 3300, page 1722.

^b Texas, Art. 321. Upon the tender of the legal or customary rates of freight on goods offered for transportation, to any common carrier whatever such carrier shall receive and transport such goods, provided his vehicle or vessel has capacity safely to carry the goods so offered on the trip or voyage then pending, and such goods are of the kind usually carried upon such vehicle or vessel, and are offered at a reasonable time. Any common carrier refusing to transport

goods, as above provided, taking in the same in the order presented, shall be liable to the party injured for damages sustained by reason of his refusal, and shall also be liable to a penalty of not less than five nor more than five hundred dollars, to be recovered in each case by the owner of the goods in any court having jurisdiction in the county where the wrong is done or where the common carrier resides; provided, this article shall not affect such corporations as are embraced in article 4496 of these statutes.

Breach of carrier's obligation to deliver freight.

California, § 3316. The detriment caused by the breach of a carrier's obligation to deliver freight, where he has not converted it to his own use, is deemed to be the value thereof at the place and on the day at which it should have been delivered, deducting the freightage to which he would have been entitled if he had completed the delivery. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6064. North Dakota, Rev. Codes 1905, § 6578. Oklahoma, Rev. and Ann. Stats. 1903

(Wilson), § 2745; Comp. Laws 1909 (Snyder), § 2903. South Dakota, Rev. Codes 1903, C. C. § 2308. Texas, Civ. Stats. 1897 (Sayles), Art. 322.

a Hawaii, § 1745, see note a to Cal. Civ. Code § 3300, page 1722.

b Texas, Art. 322. Common carriers are required, when they receive goods for transportation, to give to the shipper, when it is demanded, a bill of lading or memorandum in writing, stating the quantity, character, order and condition of the goods; and such goods shall be delivered, in the manner provided by common law, in like order and condition to consignee, the unavoidable wear and

tear and deterioration in due course of transportation only excepted; and in case such common carrier shall fail to deliver goods as above required, they shall be liable to the party injured for his damages, as at common law; and in case such common carrier[s] shall fail to deliver a bill of lading or memorandum in writing, as above required, they shall be liable to a penalty of not less than five nor more than five hundred dollars, to be recovered as in the preceding article.

Detriment caused by carrier's delay in delivery.

California, § 3317. The detriment caused by a carrier's delay in the delivery of freight, is deemed to be the depreciation in the intrinsic value of the freight during the delay, and also the depreciation, if any, in the market value thereof, otherwise than by reason of a depreciation in its intrinsic value, at the place where it ought to have been delivered, and between the day at which it ought to have been delivered, and the day of its actual delivery. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Hawaii, Rev. Laws 1905, § 1745. b Montana, Rev. Codes 1907, § 6065. North Dakota, Rev. Codes 1905, § 6579. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2746; Comp. Laws 1909 (Snyder), § 2904. South Dakota, Rev. Codes 1903, C. C. § 2309.

a Hawaii, § 1745, see note a to Cal. Civ. Code § 3300, page 1722.

b Montana, § 6065, substantially same as Cal. Civ. Code § 3317, except in the second line the words "the depreciation" are omitted between "to be" and "in the."

§ 443. DAMAGES FOR BREACH OF CONTRACTS RELATING TO REAL PROPERTY.

Detriment caused by breach of covenant of seizin, etc.

California, § 3304. The detriment caused by the breach of a covenant of "seizin," of "right to convey," of "warranty," or of "quiet enjoyment," in a grant of an estate in real property, is deemed to be:

1. The price paid to the grantor; or, if the breach is partial only, such proportion of the price as the value of the property affected by

the breach bore at the time of the grant to the value of the whole property;

2. Interest thereon for the time during which the grantee derived no benefit from the property, not exceeding five years;

3. Any expenses properly incurred by the covenantee in defending his possession. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6052.
^b North Dakota, Rev. Codes 1905, § 6566. ^c Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2733; Comp. Laws 1909 (Snyder), § 2891. ^d South Dakota, Rev. Codes 1903, C. C. § 2296.

^a Hawaii, § 1745, see note ^a to Cal. Civ. Code § 3300, page 1722.

^b North Dakota, § 6566, substantially same as Cal. Civ. Code § 3304, except near the end of sub. 2, change "five" to "six" before "years."

^c Oklahoma, § 2733, same as North Dakota § 6566.

^d South Dakota, Civ. Code § 2296, same as North Dakota § 6566.

Detriment caused by breach of covenant against encumbrances.

California, § 3305. The detriment caused by the breach of a covenant against encumbrances in a grant of an estate in real property is deemed to be the amount which has been actually expended by the covenantee in extinguishing either the principal or interest thereof, not exceeding in the former case a proportion of the price paid to the grantor equivalent to the relative value at the time of the grant of the property affected by the breach, as compared with the whole, or, in the latter case, interest on a like amount. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Hawaii, Rev. Laws 1905, § 1745. ^b Minnesota, Rev. Laws 1905, § 3345. Montana, Rev. Codes 1907, § 6053. North Dakota, Rev. Codes 1905, § 6567. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2734; Comp. Laws 1909 (Snyder), § 2892. South Dakota, Rev. Codes 1903, C. C. § 2297.

^a Hawaii, § 1745, see note ^a to Cal. Civ. Code § 3300, page 1722.

^b Minnesota, § 3345. Whoever conveys real estate by deed or mortgage containing a covenant that it is free from all encumbrances, when an encumbrance, whether known to him or not, appears of record to exist thereon, but does not exist in fact, shall be liable in an action of contract to the grantee, his heirs, executors, administrators, successors, or assigns, for all damages sustained in removing the same.

Breach of agreement to convey real estate.

California, § 3306. The detriment caused by the breach of an agreement to convey an estate in real property, is deemed to be the price paid, and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6054.**
• **North Dakota, Rev. Codes 1905, § 6568. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2735; Comp. Laws 1909 (Snyder), § 2893. South Dakota, Rev. Codes 1903, C. C. § 2298.**

• **Hawaii, § 1745, see note a to Cal. Civ. Code § 3300, page 1722.**

• **North Dakota, § 6568.** The detriment caused by the breach of an agreement to convey an estate in real property is the difference between the price agreed to be paid and the value of the estate agreed

to be conveyed at the time of the breach and the expenses properly incurred in examining the title with interest thereon, and in preparing to enter upon the land and the amount paid on the purchase price, if any, with interest thereon from the time of the breach.

Breach of agreement to buy real estate.

California, § 3307. The detriment caused by the breach of an agreement to purchase an estate in real property, is deemed to be the excess, if any, of the amount which would have been due to the seller, under the contract, over the value of the property to him. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6055.**
• **North Dakota, Rev. Codes 1905, § 6569. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2736; Comp. Laws 1909 (Snyder), § 2894. South Dakota, Rev. Codes 1903, C. C. § 2299.**

• **Hawaii, § 1745, see note a to Cal. Civ. Code § 3300, page 1722.**

• **North Dakota, § 6569, substantially same as Cal. Civ. Code § 3307, except at the end omit "to him" after "property."**

§ 444. DAMAGES FOR BREACH OF CONTRACTS RELATING TO PERSONAL PROPERTY.

Breach of agreement to deliver personal property not paid for.

California, § 3308. The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has not been fully paid in advance, is deemed to be the excess, if any, of the value of the property to the buyer, over the amount which would have been due to the seller under the contract, if it had been fulfilled. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6056. North Dakota, Rev. Codes 1905, § 6570. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2737; Comp. Laws 1909 (Snyder), § 2895. South Dakota, Rev. Codes 1903, C. C. § 2300.

• Hawaii, § 1745, see note • to Cal. Civ. Code § 3300, page 1722.

Breach of agreement to deliver personal property paid for.

California, § 3309. The detriment caused by the breach of a seller's agreement to deliver personal property, the price of which has been fully paid to him in advance, is deemed to be the same as in case of wrongful conversion. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6057. North Dakota, Rev. Codes 1905, § 6571. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2738; Comp. Laws 1909 (Snyder), § 2896. South Dakota, Rev. Codes 1903, C. C. § 2301.

• Hawaii, § 1745, see note • to Cal. Civ. Code § 3300, page 1722.

Breach of agreement to accept and pay for personal property sold.

California, § 3310. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is vested in him, is deemed to be the contract price. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6058. North Dakota, Rev. Codes 1905, § 6572. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2739; Comp. Laws 1909 (Snyder), § 2897. South Dakota, Rev. Codes 1903, C. C. § 2302.

* Hawaii, § 1745, see note * to Cal. Civ. Code § 3300, page 1722.

Breach of buyer's agreement in conditional sale.

California, § 3311. The detriment caused by the breach of a buyer's agreement to accept and pay for personal property, the title to which is not vested in him, is deemed to be:

1. If the property has been resold, pursuant to section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the net proceeds of the resale; or,

2. If the property has not been resold in the manner prescribed by section three thousand and forty-nine, the excess, if any, of the amount due from the buyer, under the contract, over the value to the seller, together with the excess, if any, of the expenses properly incurred in carrying the property to market, over those which would have been incurred for the carriage thereof, if the buyer had accepted it. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6059. North Dakota, Rev. Codes 1905, § 6573. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2740; Comp. Laws 1909 (Snyder), § 2898. South Dakota, Rev. Codes 1903, C. C. § 2303.

* Hawaii, § 1745, see note * to Cal. Civ. Code § 3300, page 1722.

Breach of warranty of title to personal property.

California, § 3312. The detriment caused by the breach of a warranty of the title of personal property sold, is deemed to be the value thereof to the buyer, when he is deprived of its possession, together with any costs which he has become liable to pay in an action brought for the property by the true owner. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6060. North Dakota, Rev. Codes 1905, § 6574. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2741. South Dakota, Rev. Codes 1903, C. C. § 2304.

* Hawaii, § 1745, see note * to Cal. Civ. Code § 3300, page 1722.

Breach of warranty of quality of personal property.

California, § 3313. The detriment caused by the breach of a warranty of the quality of personal property is deemed to be the excess, if any, of the value which the property would have had at the time to which the warranty referred, if it had been complied with, over its actual value at that time. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6061. North Dakota, Rev. Codes 1905, § 6575. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2742; Comp. Laws 1909 (Snyder), § 2900. South Dakota, Rev. Codes 1903, C. C. § 2305.**

• **Hawaii, § 1745, see note • to Cal. Civ. Code § 3300, page 1722.**

Breach of warranty of quality for special purpose.

California, § 3314. The detriment caused by the breach of a warranty of the fitness of an article of personal property for a particular purpose, is deemed to be that which is defined by the last section, together with a fair compensation for the loss incurred by an effort in good faith to use it for such purpose. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6062. North Dakota, Rev. Codes 1905, § 6676 [6576]. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2743; Comp. Laws 1909 (Snyder), § 2901. South Dakota, Rev. Codes 1903, C. C. § 2306.**

• **Hawaii, § 1745, see note • to Cal. Civ. Code § 3300, page 1722.**

§ 445. DAMAGES FOR WRONGS.**Breach of obligation not arising from contract.**

California, § 3333. For the breach of an obligation not arising from contract, the measure of damages, except where otherwise expressly provided by this code, is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745. Montana, Rev. Codes 1907, § 6068. North Dakota, Rev. Codes 1905, § 6582. Oklahoma, Rev. and Ann. Stats. 1903**

(Wilson), § 2749; Comp. Laws 1909 (Snyder), § 2907. South Dakota, Rev. Codes 1903, C. C. § 2312.

^a Hawaii, § 1745, see note ^a to Cal. Civ. Code § 3300, page 1722.

Detriment caused by wrongful occupation of real property.

California, § 3334. The detriment caused by the wrongful occupation of real property, in cases not embraced in sections thirty-three hundred and thirty-five, thirty-three hundred and forty-four, and thirty-three hundred and forty-five of this code, or section eleven hundred and seventy-four of the Code of Civil Procedure, is deemed to be the value of the use of the property for the time of such occupation, not exceeding five years next preceding the commencement of the action or proceeding to enforce the right to damages, and the costs, if any, of recovering the possession. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

^a Arkansas, Dig. of Stats. 1904 (Kirby), §§ 2747, 2748. ^b Iowa, Ann. Code 1897, § 4198. ^c Minnesota, Rev. Laws 1905, § 4432. ^d Missouri, Ann. Stats. 1906, § 3065. Montana, Rev. Codes 1907, § 6069. ^e New Mexico, Comp. Laws 1897, § 3170 (§ 2685, sub-sec. 257, Laws 1907, p. 285). ^f North Dakota, Rev. Codes 1905, § 6583. ^g Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2750; Comp. Laws 1909 (Snyder), § 2908. ^h South Dakota, Rev. Codes 1903, C. C. § 2313. ⁱ Texas, Civ. Stats. 1897 (Sayles), Art. 5273. ^j Washington, Code 1910 (Rem. & Bal.), §§ 796, 797.

^{a1} Arkansas, § 2747. If the plaintiff prevail in the action, he shall recover, by way of damages, the rent and profits down to the time of assessing the same, except where the plaintiff, or those under whom he claims title, may have entered, in any land office of the United States within this state, the improvement of the defendant, and the action is brought to recover the possession of such improvement, in which case the plaintiff shall recover no damages.

^{a2} Arkansas, § 2748. If the right of the plaintiff to the possession of the premises expires after the commencement of the action, and before the trial, the verdict shall be returned according to the fact, and judgment shall be entered only for the damages and costs.

^b Iowa, § 4198. The plaintiff cannot recover for the use and occupation of the premises for more than five years prior to the commencement of the action.

^c Minnesota, § 4432. Damages for withholding the property recovered shall not exceed the fair value of the use of the property, exclusive of the use of improvements made by the defendant, for a period not exceeding six years; and, when permanent improvements have been made by a defendant, or those under whom he claims, holding under color of title adversely to the claims of the plaintiff, in good faith, the value thereof shall be allowed as a set-off against the damages of the plaintiff.

^d Missouri, § 3065. If the plaintiff prevail in the action, he shall recover damages for all waste and injury, and, by way of damages, the rents and profits, down to the time of assessing the same, or to the time of the expiration of the plaintiff's title, under the following limitations: First, when it shall not be shown on the trial that the defendant had knowledge of the plaintiff's claim

prior to the commencement of the action, such recovery shall be only from the time of the commencement of the action; second, when it shall be shown on the trial that the defendant had knowledge of the plaintiff's claim prior to the commencement of the action, and that such knowledge came to the defendant within five years next preceding the commencement of the action, such recovery shall be from the time that such knowledge came to the defendant; third, when it shall be shown on the trial that knowledge of the plaintiff's claim came to the defendant more than five years prior to the commencement of the action, such recovery shall only be for the term of five years next preceding the commencement of the action.

• New Mexico, § 3170. If the plaintiff prevail, he shall recover for damages the value of the rents and profits of such premises to the time of the verdict or the expiration of the plaintiff's title, under these limitations:

First. If the defendant had knowledge of the plaintiff's claim or title, then for the whole time he had such knowledge.

Second. If he had no such knowledge, then from the commencement of the action. (Re-enacted as § 2685, sub-sec. 257, Mch. 12, 1907, Laws 1907, pp. 269, 285.)

† North Dakota, § 6583, substantially same as Cal. Civ. Code § 3334, except in line 3 from the end change "five" to "six" before "years."

g Oklahoma, § 2750, substantially same as North Dakota § 6583.

h South Dakota, C. C. § 2313, substantially same as North Dakota § 6583.

i Texas, Art. 5273. Where it is alleged and proved that one of the parties is in possession of the premises the court or jury, if they find for the adverse party, shall assess the damages for the use and occupation of the premises, and if special injury to the property be alleged and proved, the damages for such injury shall also be assessed, and the proper judgment shall be entered therefor, on which execution may issue, but damages shall not be assessed under this article for use and occupation, or for injuries done over two years prior to the commencement of the suit.

j1 Washington, § 796. The plaintiff shall only be entitled to recover damages for withholding the property for the term of six years next preceding the commencement of the action, and for any period that may elapse from such commencement to the time of giving a verdict therein, exclusive of the use of permanent improvements made by the defendant.

j2 Washington, § 797. In an action for the recovery of real property upon which permanent improvements have been made or general or special taxes or local assessments have been paid by a defendant, or those under whom he claims, holding in good faith under color or claim of title adversely to the claim of plaintiff, the value of such improvements and the amount of such taxes or assessments with interest thereon from date of payment must be allowed as a counterclaim to the defendant.

Measure of damages for wilfully holding over.

California, § 3335. For wilfully holding over real property, by a person who entered upon the same, as guardian or trustee for an infant, or by right of an estate terminable with any life or lives, after the termination of the trust or particular estate, without the consent of the party immediately entitled after such termination, the measure of damages is the value of the profits received during such holding over. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6070. North Dakota, Rev. Codes 1905, § 6584. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2751; Comp. Laws 1909 (Snyder), § 2909. South Dakota, Rev. Codes 1903, C. C. § 2314.

Detriment caused by conversion of personal property.

California, § 3336. The detriment caused by the wrongful conversion of personal property is presumed to be:

1. The value of the property at the time of the conversion, with the interest from that time, or, where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party; and

2. A fair compensation for the time and money properly expended in pursuit of the property. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6071. North Dakota, Rev. Codes 1905, § 6585. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2752; Comp. Laws 1909 (Snyder), § 2910. South Dakota, Rev. Codes 1903, C. C. § 2315.

Presumption as to wrongful conversion.

California, § 3337. The presumption declared by the last section cannot be repelled, in favor of one whose possession was wrongful from the beginning, by his subsequent application of the property to the benefit of the owner, without his consent. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6072. North Dakota, Rev. Codes 1905, § 6586. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2753; Comp. Laws 1909 (Snyder), § 2911. South Dakota, Rev. Codes 1903, C. C. § 2316.

Damages in conversion to party having lien.

California, § 3338. One having a mere lien on personal property, cannot recover greater damages for its conversion, from one having a right thereto superior to his, after his lien is discharged, than the amount secured by the lien, and the compensation allowed by section thirty-three hundred and thirty-six for loss of time and expenses. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6073. North Dakota, Rev. Codes 1905, § 6587. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2754; Comp. Laws 1909 (Snyder), § 2912. South Dakota, Rev. Codes 1903, C. C. § 2317.

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Damages for seduction.

California, § 3339. The damages for seduction rest in the sound discretion of the jury. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, § 1745.** **Montana, Rev. Codes 1907, § 6074.** **North Dakota, Rev. Codes 1905, § 6588.** **Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2755; Comp. Laws 1909 (Snyder), § 2913.** **South Dakota, Rev. Codes 1903, C. C. § 2318.**

• **Hawaii, § 1745, see note a to Cal. Civ. Code § 3300, page 1722.**

Injuries caused by dogs, etc., to other animals.

California, § 3341. The owner, possessor, or harbinger of any dog or other animal, that shall kill, worry, or wound any sheep, angora goat, or cashmere goat, or poultry, shall be liable to the owner of the same for the damages and costs of suit, to be recovered in any court of competent jurisdiction:

1. In the prosecution of actions under the provisions of this chapter, it shall not be necessary for the plaintiff to show that the owner, possessor, or harbinger of such dog or other animal, had knowledge of the fact that such dog or other animal would kill, wound or worry sheep, goats, or poultry.

2. Any person on finding any dog or dogs, or other animal, not on the premises of the owner or possessor of such dog or dogs, or other animal, worrying, wounding, or killing any sheep, angora or cashmere goats, may, at the time of finding such dog or dogs, or other animal, kill the same, and the owner or owners thereof shall sustain no action for damages against any person so killing such dog or dogs, or other animal. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Arkansas, Dig. of Stats. 1904 (Kirby), §§ 7892-7896.** • **Colorado, Rev. Stats. 1908, § 6387.** • **Hawaii, Rev. Laws 1905, § 439.** • **Idaho, Rev. Codes 1909, § 1220.** • **Iowa, Ann. Code 1897, § 2340.** • **Kansas, Gen. Stats. 1905 (Dassler), §§ 8114, 8115.** • **Minnesota, Rev. Laws 1905, §§ 2786, 2788.** • **Missouri, Ann. Stats. 1906, §§ 6975, 6976.** • **Nebraska, Comp. Stats. Ann. 1909, § 542; Ann. Stats. (Cobbey), § 3217.** • **New Mexico, Laws 1901, p. 198, § 2.** • **North Dakota, Rev. Codes 1905, §§ 1957, 1958.** • **Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), §§ 4198, 4199.** • **South Dakota, Rev. Codes 1903,**

Pol. Code §§ 2956, 2957. * Utah, Comp. Laws 1907, §§ 70, 71. ° Wisconsin, Stats. 1898 (San. & Ber. Ann.), §§ 1619-1622. » Wyoming, Rev. Stats. 1899, § 2014.

a1 Arkansas, § 7892. Any person or persons owning or having in possession or under control any dog, shall be liable in damages to the owner or owners of any sheep killed or injured by such dog in the full value of such sheep killed or injured.

a2 Arkansas, § 7893. Any person or persons engaged in sheep-raising or owning any sheep, who shall sustain any loss or damage to his or their sheep by any dog, shall have a right of action against the owner or owners, possessor or possessors, controller or controllers of such dog in the manner hereinafter provided.

a3 Arkansas, § 7894. The person or persons sustaining loss or damage as mentioned in the preceding section, and desiring remuneration therefor, may go before some justice of the peace of the county wherein the loss or damage occurred, and make oath of the character of the loss or damage sustained, the value of the same, the dog or dogs, and the owner, possessor or controller of the same, and file the same with such justice, who shall issue a summons stating the nature of the plaintiff's claim, the amount claimed and the cost accrued, which shall be served and returned as in ordinary actions.

a4 Arkansas, § 7895. If the defendant shall pay to the officer serving the summons the amount of damages claimed, and the costs indorsed, and a further fee to the officer of twenty-five cents for making the return, said summons shall be returned satisfied, and no further proceedings had. If the defendant fail, neglect or refuse to pay the same, the justice shall try the cause as in other ordinary actions, and give judgment in favor of plaintiff for the amount of damage proven in the cause, which the defendant or defendants may be liable by the provisions of this act.

a5 Arkansas, § 7896. In a second suit and recovery by any plaintiff against the same defendant, on account of killing or injury done by the same dog, the justice shall render judgment for double the amount of damages proven.

b Colorado, § 6387. Any dogs found running, worrying or injuring sheep or

cattle, may be killed, and the owner or harbinger of such dog shall be liable for all damages done by it.

c Hawaii, § 439. If any dog shall injure or destroy any sheep or cattle, goats, hogs, fowls, or other property belonging to any person other than the owner of such dog, the owner shall be liable in damages to the person injured, for the value of the property so injured or destroyed; and it shall be the duty of the owner to confine or destroy such dog, and if he neglect or refuse to do so, he shall, in the event of any further damage being done to the person or property of any person by such dog, in addition to paying the person injured for such damage, pay the costs of the trial, together with a fine of ten dollars, or in default of the payment of such fine, be imprisoned at hard labor for the term of thirty days, and it shall be lawful for any other person to destroy said dog.

d Idaho, § 1220, substantially same as Cal. Civ. Code § 3341, except in line 3 of the opening and at the end of sub. 1, omit "or poultry"; also in sub. 2, in lines 1 and 5, omit "or other animal" after "dogs."

e Iowa, § 2340. It shall be lawful for any person to kill any dog caught in the act of worrying, maiming or killing any sheep or lamb, or other domestic animal, or any dog attacking or attempting to bite any person, and the owner shall be liable to the party injured for all damages done, except when the party is doing an unlawful act. The provisions of this section shall not apply to any damage done by a dog affected with hydrophobia. (Amended April 18, 1904, Sup. 1907.)

f1 Kansas, § 8114. If any dog shall kill or injure any sheep, the owner or keeper of such dog shall be liable for all damages that may be sustained thereby, to be recovered by the party so injured before any court having competent jurisdiction.

f2 Kansas, § 8115. It shall be lawful for any person at any time to kill any dog which may be found worrying or injuring sheep.

g1 Minnesota, § 2786. The owner or keeper of any dog that shall kill, wound,

or worry any domestic animal shall be liable to the owner thereof for the value of such animal, without proving notice to such owner or keeper, or knowledge by him, that such dog was mischievous or disposed to kill or worry such animals.

g2 Minnesota, § 2788. Any person may kill any dog found injuring or worrying sheep, and any owner of sheep may kill any dog found on his premises where sheep are kept, not under the restraint or control of his owner or other person.

h1 Missouri, § 6975. In every case where sheep or other domestic animals are killed or maimed by dogs, the owner of such animals may recover against the owner or keeper of such dog or dogs the full amount of damages, and the owner shall forthwith kill such dog or dogs; and for every day he shall refuse or neglect to do so, after notice, he shall pay and forfeit the sum of one dollar, and it shall be lawful for any person to kill such dog or dogs.

h2 Missouri, § 6976. If any person shall discover any dog or dogs in the act of killing, wounding or chasing sheep in any portion of this state, or shall discover any dog or dogs under such circumstances as to satisfactorily show that such dog or dogs has or have been recently engaged in killing or chasing sheep or other domestic animal or animals, such person is authorized to immediately pursue and kill such dog or dogs: Provided, however, that such dog or dogs shall not be killed in any enclosure belonging to or being in lawful possession of the owner of such dog or dogs.

i Nebraska, § 542. That dogs are hereby declared to be personal property for all intents and purposes and the owner or owners of any dog or dogs shall be liable for any and all damages that may accrue to any person, firm or corporation by reason of such dog or dogs killing, wounding, worrying, or chasing any sheep or other domestic animal belonging to such other person, firm or corporation and such damage [may] be recovered from [in] any court having jurisdiction of the amount claimed.

j New Mexico, Laws 1901, p. 198, § 2. If any dog shall kill or injure any sheep, the owner or keeper of such dog shall be liable for all damages that may be sustained thereby, to be recovered by the party so injured before any court having competent jurisdiction, and it

shall be unlawful to keep such dog after it is known that the dog is liable to kill sheep, but it shall be the duty of the owner to kill the same. (Enacted March 21, 1901.)

k1 North Dakota, § 1957. If any person shall discover any dog in the act of killing, wounding, or chasing sheep in this state, or shall discover any dog under such circumstances as satisfactorily to show that it has been recently engaged in killing or chasing sheep, such person is authorized immediately to pursue and kill such dog.

k2 North Dakota, § 1958. The owner of any dog shall be liable in a civil action for all damages that may accrue to any person by reason of such dog's killing, wounding or chasing any sheep or other domestic animal belonging to such person.

l1 Oregon, § 4198. The owner of any dog shall be liable for all damages that may accrue to any person or persons in this state by reason of such dog killing, wounding, or chasing any sheep or other domestic animal belonging to such other person or persons, the same to be recovered in an action for debt before any court having jurisdiction.

l2 Oregon, § 4199. If any person shall discover any dog in the act of killing, wounding, or chasing any sheep or other domestic animals in any portion of this state, or shall discover any dog under such circumstances as to satisfactorily show that such dog has been recently engaged in killing or chasing sheep or other domestic animals for the purpose of killing them, such person is authorized to immediately pursue and kill such dog.

m1 South Dakota, Pol. C. § 2956. Any person keeping, owning or harboring a dog that shall chase, worry or kill horses, mules, cattle or sheep, shall be liable for all damages committed by such dog upon any horses, mules, cattle or sheep, to the owner or owners of such horses, mules, cattle or sheep, and shall not be entitled to any benefit from the laws exempting property from execution, but all property shall be subject to execution and judgment for such damages and costs.

m2 South Dakota, Pol. C. § 2957. It shall be lawful for any person to kill any dog off the premises of the owner of such dog found chasing or worrying sheep.

n1 Utah, § 70. Every person owning or keeping a dog shall be liable in damages

for any injurious act committed by such dog; and it shall not be necessary in any action brought therefor to allege or prove that such dog was of a vicious or mischievous disposition, or that the owner or keeper thereof knew that it was vicious or mischievous.

n2 Utah, § 71. Where any injury has been committed by two or more dogs acting together, and such dogs are owned or kept by different persons, all such persons may be joined as defendants in the same action to recover damages therefor, and the amount found by the court or jury for such injury shall be apportioned among the several defendants found liable, and judgment entered severally against them for the amount so apportioned.

o1 Wisconsin, § 1619. Any person may kill any dog, that he knows is affected with the disease known as hydrophobia, or that may suddenly assault him while he is peacefully walking or riding and while being out of the enclosure or immediate care of its owner or keeper, and may kill any dog before its return to the enclosure or immediate care of its owner or keeper which shall be found killing, wounding or worrying any horses, cattle, sheep, lambs or other domestic animals. (Amended 1903, Sup. 3, p. 722.)

o2 Wisconsin, § 1620. The owner or keeper of any dog which shall have injured or caused the injury of any person or property or killed, wounded or worried any horses, cattle, sheep or lambs shall be liable to the person so injured and the owner of such animals for all damages so done, without proving notice to the owner or keeper of such dog or knowledge by him that his dog was mis-

chievous or disposed to kill, wound or worry horses, cattle, sheep or lambs.

o3 Wisconsin, § 1621. If any dog shall worry, wound or kill any horses, cattle, sheep or lambs, and the person owning or harboring such dog shall not keep such dog confined after being notified of such worrying, wounding or killing, such owner or keeper shall be liable to pay damage in double the value of any horses, cattle, sheep or lambs which may be thereafter killed or injured by such dog, to be recovered in an action by the owner of such animals; and any person may kill any such dog if found out of the enclosure or immediate care of its owner or keeper after the twenty-four hours from the time of such notice.

o4 Wisconsin, § 1622. Any person suffering personal injury by any dog in the manner set forth in the first section of this chapter may give notice to the owner or keeper of the act done, and if after such notice such dog shall injure any person, or wound or kill any horses, cattle, sheep or lambs, or do any other mischief or injury the owner or keeper shall be liable to pay to the person injured thereby treble damages.

p Wyoming, § 2014. Dogs running livestock against the wish of the owner of such livestock, may be killed in cases where the livestock has been injured or is threatened with injury thereby; and the person killing any such dog shall not be liable to the owner thereof where the vicious character of the dog, or the damage or danger of damage, is shown; provided, however, that when livestock is trespassing upon property, the owner thereof may use dogs to drive and keep off livestock from said property.

§ 446. PENAL DAMAGES.

Exemplary or punitive damages.

California, § 3294. In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Colorado, Rev. Stats. 1908, § 2067. b Montana, Rev. Codes 1907, § 6047.
 • North Dakota, Rev. Codes 1905, § 6562. d Oklahoma, Rev. and Ann. Stats.
 1903 (Wilson), § 2729; Comp. Laws 1909 (Snyder), § 2887. • South Dakota,
 Rev. Codes 1903, C. C. § 2292.

a Colorado, § 2067. That in all civil actions in which damages shall be assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of shall have been attended by circumstances of fraud, malice or insult, or a wanton and reckless disregard of the injured party's rights and feelings, such jury may, in addition to the actual damages sustained by such party, award him reasonable exemplary damages.

b Montana, § 6047, substantially same as Cal. Civ. Code § 3294, except in line 3 after "malice" change "express or implied, the plaintiff," to "actual or presumed, the jury"; also in line 4 after "may" change "recover" to "give."

• North Dakota, § 6562, substantially same as Montana § 6047.

d Oklahoma, § 2729, same as Montana § 6047.

• South Dakota, C. C. § 2292, same as Montana § 6047.

Damages for wilful or negligent injuries to animals.

California, § 3340. For wrongful injuries to animals being subjects of property, committed wilfully or by gross negligence, in disregard of humanity, exemplary damages may be given. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6075. North Dakota, Rev. Codes 1905, § 6589. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2756; Comp. Laws 1909 (Snyder), § 2914. South Dakota, Rev. Codes 1903, C. C. § 2319.

Damages for failure to quit after notice.

California, § 3344. If any tenant give notice of his intention to quit the premises, and does not deliver up the possession at the time specified in the notice, he must pay to the landlord treble rent during the time he continues in possession after such notice. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Arkansas, Dig. of Stats. 1904 (Kirby), § 4694. b Iowa, Ann. Code 1897, § 2989. c Missouri, Ann. Stats. 1906, § 4104. Montana, Rev. Codes 1907, § 6076.
 d North Dakota, Rev. Codes 1905, § 6590. • Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2757; Comp. Laws 1909 (Snyder), § 2915. f South Dakota, Rev. Codes 1903, C. C. § 2320. g Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2185.

a Arkansas, § 4694. If any tenant shall give notice in writing of his intention to quit the premises held by him at a time specified in such notice, and shall

not deliver up the possession thereof at such time, such tenant, his executor or administrator, shall from thenceforward pay to the landlord, his heirs or

assigns, double the rent reserved during all the time such tenant shall so continue in possession of such premises.

• Iowa, § 2989. A tenant giving notice of his intention to quit leased premises at a time named, and afterwards holding over, and a tenant or his assignee wilfully holding over after the term, and after notice to quit, shall pay double the rental value thereof during the time he holds over to the person entitled thereto.

• Missouri, § 4104, substantially same as Arkansas § 4694.

• North Dakota, § 6590. For the failure of a tenant to give up the premises held by him, when he has given notice of his intention to do so, the measure of damages is double the rent which he ought otherwise to pay.

• Oklahoma, § 2757, same as North Dakota § 6590.

• South Dakota, C. C. § 2320, same as North Dakota § 6590.

• Wisconsin, § 2185, substantially same as Arkansas § 4694.

Damages for wilfully holding over after demand and notice.

California, § 3345. If any tenant, or any person in collusion with the tenant, holds over any lands or tenements after demand made and one month's notice, in writing given, requiring the possession thereof, such person holding over must pay to the landlord treble rent during the time he continues in possession after such notice. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Arkansas, Dig. of Stats. 1904 (Kirby), § 4696. • Iowa, Ann. Code 1897, § 2989. • Missouri, Ann. Stats. 1906, § 4106. Montana, Rev. Codes 1907, § 6077. • North Dakota, Rev. Codes 1905, § 6591. • Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2758; Comp. Laws 1909 (Snyder), § 2916. • South Dakota, Rev. Codes 1903, C. C. § 2321. • Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 2186.

• Arkansas, § 4696. If any tenant for life or years, or if any other person who may have come into possession of any lands and tenements, under or by collusion with such tenant, shall wilfully hold over the same after the termination of such term, and thirty days' previous notice in writing given requiring the possession thereof by the person entitled thereto, such person so holding over shall pay to the person so kept out of possession double the yearly rents of the lands or tenements so detained for all time he shall keep the person entitled thereto out of possession.

• Iowa, § 2989, see note b to Cal. Civ. Code § 3344.

• Missouri, § 4106, substantially same as Arkansas § 4696, except in line 7 after "term, and" change "thirty days' previous" to "after demand made and" be-

fore "notice in writing"; also in line 4 from the end after "yearly" change "rents" to "value."

• North Dakota, § 6591. For wilfully holding over real property by a tenant after the end of his term and after notice to quit has been duly given and demand of possession made the measure of damages is double the yearly value of the property for the time of withholding in addition to compensation for the detriment occasioned thereby.

• Oklahoma, § 2758, same as North Dakota § 6591.

• South Dakota, C. C. § 2321, same as North Dakota § 6591.

• Wisconsin, § 2186, substantially same as Arkansas § 4696, except in line 4 after "such" change "term, and thirty days' previous" to "time and after demand made and one month's" before

"notice"; also in line 4 from the last, after "possession," insert "or his representatives at the rate of" before "double"; also in line 4 from the last change "rents" to "value" after

"yearly"; also at the end add "and shall also pay and remunerate all special damage whatever to which the person so kept out of possession may be subjected by reason of such holding over."

Measure of damages for injuries to trees, etc.

California, § 3346. For wrongful injuries to timber, trees, or underwood upon the land of another, or removal thereof, the measure of damages is three times such a sum as would compensate for the actual detriment, except where the trespass was casual and involuntary, or committed under the belief that the land belonged to the trespasser, or where the wood was taken by the authority of highway officers for the purposes of a highway; in which cases the damages are a sum equal to the actual detriment. (Kerr's Cyc. Civ. Code.)

Damages for firing woods.

California, § 3346a. Every person negligently setting fire to his own woods, or negligently suffering any fire to extend beyond his own land, is liable in treble damages to the party injured. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Arkansas, Dig. of Stats. 1904 (Kirby), § 1698.** • **Colorado, Rev. Stats. 1908, § 2070.** • **Kansas, Gen. Stats. 1905 (Dassler), § 8742.** • **Missouri, Ann. Stats. 1906, § 2872.** • **New Mexico, Comp. Laws 1897, § 3222.** • **North Dakota, Rev. Codes 1905, § 2067.** • **Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 2361; Comp. Laws 1909 (Snyder), § 2484.** • **South Dakota, Rev. Codes 1903, Pen. Code § 473.** • **Washington, Code 1910 (Rem. & Bal.), § 5141.** • **Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 4406.**

• **Arkansas, § 1698.** If any person shall wilfully set on fire any woods, marshes or prairies, whether his own or not, so as thereby to occasion any damage to any other person, such person shall make satisfaction in double damages to the party injured, to be recovered by civil action.

• **Colorado, § 2070.** If any person shall set on fire any woods or prairie, so as to damage any other person, such person shall make satisfaction for the damage to the party injured, to be recovered in an action before any court of competent jurisdiction.

• **Kansas, § 8742.** If any person shall set on fire any woods, marshes or prai-

ries so as thereby to occasion damage to any other person, he shall be liable to the party injured for the full amount of such damage, to be recovered by civil action.

• **Missouri, § 2872, same as Arkansas § 1698.**

• **New Mexico, § 3222, substantially same as Arkansas § 1698, except in line 2 after "shall" omit "wilfully" before "set on fire."**

• **North Dakota, § 2067.** If any person shall wilfully, negligently or carelessly set or cause to be set on fire any woods, marsh or prairie in this state, or if any person having made any camp or other fire, shall leave such fire without having

thoroughly extinguished the same, so that the fire shall spread and burn any wood, marsh or prairie, the person guilty of setting or causing to set such fire or leaving such camp or other fire without having thoroughly extinguished the same, so that the fire shall not spread therefrom, is guilty of a misdemeanor, and upon conviction thereof is punishable by a fine not exceeding two hundred dollars or by imprisonment in the county jail not exceeding one year, or by both in the discretion of the court, and shall also be liable in a civil action to any person damaged by such fire to the amount of such damage.

§ Oklahoma, § 2361. Every person who negligently or carelessly sets on fire, or causes to be set on fire, any woods, marshes, or prairies, or who, having set the same on fire, or caused it to be done, negligently or carelessly, or without full precaution or efforts to prevent, permits it to spread beyond his control, shall, upon conviction, be fined not exceeding one hundred dollars and not less than ten dollars, and shall be liable to the injured parties for all damages occasioned

thereby. One-half of such fine shall, when collected, go to the informer.

h South Dakota, Pen. Code § 473, same as Oklahoma § 2361.

i Washington, § 5141. If any person shall for any lawful purpose kindle a fire upon his own land, he shall do it at such time and in such manner, and shall take such care of it to prevent it from spreading and doing damage to other persons' property, as a prudent and careful man would do, and if he fail so to do he shall be liable in an action to any person suffering damage thereby to the full amount of such damage.

j Wisconsin, § 4406. * * * Any person who shall wilfully or negligently set fire to or assist another to set fire on any land, whereby such land is injured or endangered, or shall wilfully or negligently suffer any fire upon his own land to escape beyond the limits thereof, to the injury of the land of another, shall be punished as hereinbefore provided and be liable to the person injured for all damage that may be caused by the fire.

Damages for detriment caused by a duel.

California, § 3347. If any person slays or permanently disables another person in a duel in this state, the slayer must provide for the maintenance of the widow or wife of the person slain or permanently disabled, and for the minor children, in such manner and at such cost, either by aggregate compensation in damages to each, or by a monthly, quarterly, or annual allowance, to be determined by the court. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Montana, Rev. Codes 1907, § 6079. * **Washington, Code 1910 (Rem. & Bal.), § 183.**

a Washington, § 183. The widow, or widow and her children, or child or children if no widow, of a man killed in a duel, shall have a right of action against the persons killing him, and

against the seconds and all aiders and abettors. * * * In every such action the jury may give such damages, as under all circumstances of the case may to them seem just.

Liability to pay debts of person slain or permanently disabled in duel.

California, § 3348. If any person slays or permanently disables another person in a duel in this state, the slayer is liable for and must pay all debts of the person slain or permanently disabled. (Kerr's Cyc. Civ. Code.)

The following statute treats of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6080.

§ 447. ANNOTATIONS.—Damages.

1. Redress in law and equity.—Distinctions.
2. "Proximate cause" defined.
- 3, 4. Future earnings as element of damages.—Loss of time.
- 5, 6. Special damages.
7. Speculative damages.
8. Liquidated damages.
9. Demand for damages not necessary.
10. Breach of contract to buy.—Measure of damages.
11. Pleading damages.
12. Allowance of interest.
13. Personal injuries caused by known defect.
14. Punitive damages.
- 15, 16. Exemplary damages.—For malicious ejection.
- 17, 18. "Wilful."—Meaning construed.
19. Allegation as basis for exemplary damages.

1. Redress in law and equity.—Distinctions. — Distinctions between kinds of redress given by law and equity are not sought to be obliterated by the California statute, although courts of law and equity are merged into one, and a party is awarded such legal or equitable redress as the simple pleading of ultimate facts shows him to be entitled to: *Glock v. Howard & W. C. Co.*, 123 Cal. 1, 6, 55 Pac. 713, 69 Am. St. Rep. 17, 43 L. R. A. 199.

2. "Proximate cause" defined.—"Proximate cause" means that efficient cause which necessarily sets other causes in operation. Causes which are merely incidental or instruments of some other controlling agency are not proximate: *Smith v. Los Angeles & P. R. Co.*, 98 Cal. 210, 214, 33 Pac. 53; *Westwater v. Grace Church*, 140 Cal. 339, 342, 73 Pac. 1055. See *Friend & T. L. Co. v. Miller*, 67 Cal. 464, 467, 8 Pac. 40; *Cederberg v. Robison*, 100 Cal. 93, 97-99, 34 Pac. 625; *Martin v. Deetz*, 102 Cal. 55, 36 Pac. 368, 41 Am. St. Rep. 151; *Shoemaker v. Acker*, 116 Cal. 239, 244, 48 Pac. 62; *Crow v. San Joaquin etc. C. & I. Co.*, 130 Cal. 309, 314, 62 Pac. 562, 1058.

3. Future earnings as element of damages.—Under an averment in the petition, "that, because of the premanency of her said injuries, she is and ever will be incapacitated from earning her livelihood at her chosen and established trade, to wit, that of seamstress and dressmaker"; held, that the defendant was sufficiently notified by this averment to prepare to meet the issue of earnings lost from the date of the injury of the plaintiff in an action to recover for such injuries: *Hitchings v. City of Maryville*, 134 Mo. App. 712, 115 S. W. 473, 475, citing *Wilbur v. Railway*, 110 Mo. App. 689, 85 S. W. 671.

4. An averment of loss of time in an action to recover for injuries caused by the reckless driving of an automobile, held equivalent to an averment of loss of earnings: *Scholl v. Grayson* (Mo. App.), 127 S. W. 415, 417. See *Slaughter v. Railroad*, 116 Mo. 269, 275, 23 S. W. 760.

5. Special damages which are the natural, but not the necessary, result of the injury complained of must be specially alleged: *O'Brien v. Quinn*, 35 Mont. 441, 90 Pac. 166, 168; *Root v.*

Butte etc. R. Co., 20 Mont. 354, 51 Pac. 135.

6. Special damages are those which are awarded upon the theory that parties who contracted with full knowledge of facts, circumstances, and objects of the agreement may well be supposed to have had in contemplation all the proximate and natural results flowing from its breach: *Wallace v. Ah Sam*, 71 Cal. 197, 201, 12 Pac. 46, 60 Am. Rep. 534.

7. Speculative damages are not recoverable. The verdict should be confined to such detriment only as was proximately caused by the wrongful act: *Hawthorne v. Siegel*, 88 Cal. 159, 163-166, 25 Pac. 1114, 22 Am. St. Rep. 291.

8. Liquidated damages will be allowed in accordance with the stipulation of the parties if it appears that the sum named was not intended as a mere forfeiture or penalty, even if the agreement seem to have been made improvidently: *Streeter v. Rush*, 25 Cal. 67, 71; *Muldoon v. Lynch*, 66 Cal. 536, 539, 540, 6 Pac. 417.

9. Demand for damages is not necessary in order to maintain an action for damages or to abate a nuisance: *Willhite v. Billings & E. M. P. Co.*, 39 Mont. 1, 101 Pac. 168, 169.

10. Breach of contract to buy.—Measure of damages.—Upon a breach of contract to purchase goods by the buyer, the general rule is that the measure of damages is the excess of the price fixed by the contract over the market value of the goods at the time and place of the delivery: *Kirchman v. Tuffi Bros.* (Ark.), 122 S. W. 239, 241, and cases there cited.

11. Pleading damages.—Where the complaint conforms to the statute in regard to the estimate and measure of damages in case of a breach of contract, it is not necessary to be more definite or specific in alleging items of damage: *Kirchman v. Tuffi Bros.* (Ark.), 122 S. W. 239, 241.

12. Allowance of interest.—In a suit for breach of contract, the court may in a proper case allow the plaintiff interest upon the amount of damages sustained from the date of filing the complaint: *Cutting F. P. Co. v. Cauty*, 141 Cal. 692, 697, 75 Pac. 564.

13. Personal injuries caused by known defect.—Where a defective article was sold under the representation that it was safe for use, but the vendor knew it to

be dangerous, he is liable for personal injuries caused by reason of such known defect to any person who used the article, notwithstanding the fact that there was no privity of contract between them: *Lewis v. Terry*, 111 Cal. 39, 43 Pac. 398, 52 Am. St. Rep. 146, 31 L. R. A. 220.

14. Punitive damages are not assessable as a matter of right: *Tilton v. James L. Gates L. Co.*, 140 Wis. 197, 121 N. W. 331, 336; *Robinson v. Superior R. T. Co.*, 94 Wis. 345, 68 N. W. 961, 59 Am. St. Rep. 897, 34 L. R. A. 205.

15. Exemplary damages can be recovered only where the act complained of is the result of wilful misconduct: *Yerlan v. Linkletter*, 80 Cal. 135, 138, 22 Pac. 70.

16. Exemplary damages for malicious ejection.—A railroad company is not liable in exemplary damages for any malicious or wanton conduct of its conductor in wrongfully ejecting a passenger from a train, unless the act complained of was done with the authority, express or implied, of such company, or was subsequently adopted by it: *Warner v. Southern Pacific Co.*, 113 Cal. 105, 106, 45 Pac. 187, 54 Am. St. Rep. 327.

17. "Wilful" does not imply malice or wrong towards the other party, but is synonymous with "intentional": *Benkert v. Benkert*, 32 Cal. 467, 470. See *Thornburg v. Thornburg*, 18 W. Va. 526.

18. The word "wilful" is not necessarily technical. Ordinary words shall be construed "according to the context and the approved usage of the language": *Towle v. Matheus*, 130 Cal. 574, 577, 62 Pac. 1064.

19. An allegation as a basis for exemplary damages within section 3294 of the California Civil Code is sufficient which reads as follows: "That the defendant refused to comply with said demand and refused to supply the plaintiff with water unless the plaintiff would repay to the defendant the amount paid by defendant to plaintiff for the right of way across his lands for the said ditch or canal; that the said refusal of the defendant was wanton, wilful, malicious, and without any right whatever, and was made for the purpose of extorting from this plaintiff the amount of money paid by defendant to plaintiff for said right of way, * * * and for

the purpose of damaging, injuring, and destroying the crop growing on said lands, and for the purpose of vexing, harassing, and annoying this plaintiff herein": *Lowe v. Yolo County C. W. Co.*, 8 Cal. App. 167, 96 Pac. 379, 381,

(for damages for fallure to deliver water for irrigation). See *Greenberg v. Western Turf Assn.*, 140 Cal. 358, 73 Pac. 1050, (holding instruction proper for punitive damages).

CHAPTER CXXVIII.

Penalties and Forfeitures.

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§ 448. CODE PROVISIONS.

Relief in case of forfeiture.

California, § 3275. Whenever, by the terms of an obligation, a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture, by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, wilful, or fraudulent breach of duty. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6039. **North Dakota**, Rev. Codes 1905, § 6555. **Oklahoma**, Rev. and Ann. Stats. 1903 (Wilson), § 2722; **Comp. Laws** 1909 (Snyder), § 2880. **South Dakota**, Rev. Codes 1903, C. C. § 2285.

Penalty for overcharging.

California, § 504. Any corporation, or agent or employee thereof, demanding or charging a greater sum of money for fare on the cars of [a] * * * street railroad than that fixed, as provided in this title, [regulating street railroad corporations generally,] forfeits to the person from whom such sum is received, or who is thus overcharged, the sum of two hundred dollars, to be recovered in a civil action, in any justice's court having jurisdiction thereof, against the corporation. (Kerr's Cyc. Civ. Code.)

The following statute treats of the same subject as the foregoing:

• Hawaii, Rev. Laws 1905, § 843.

• Hawaii, § 843. (After providing for fares, regulations, etc.) * * *

If said association and others, or any agent or employee thereof, shall demand or charge a greater sum of money for fare on the cars of said association and others than that fixed by this chapter, such association and others, or such

agent or employee shall forfeit to the person who is thus overcharged the sum of one hundred dollars, to be recovered in a civil action in any court having jurisdiction thereof. * * * (The remainder of the section relates to trial, presumptions, etc.)

Regulations as to tolls, toll-roads—Penalties, etc.

California, § 514. All wagon-road corporations may bridge or keep ferries on streams on the line of their road, and must do all things necessary to keep the same in repair. They may take such tolls only on their roads, ferries, or bridges, as are fixed by the board of supervisors of the proper county through which the road passes, or in which the ferry or bridge is situate. But in no case must the tolls be more than sufficient to pay fifteen per cent, nor less than ten per cent per annum, on the cost of construction, after paying for repairs and other expenses for attending to the roads, bridges, or ferries. If tolls, other than as herein provided, are charged or demanded, the corporation forfeits its franchise, and must pay to the party so charged one hundred dollars as liquidated damages. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• Arizona, Rev. Stats. 1901, §§ 3999, 4005. • Colorado, Rev. Stats. 1908, C. C. § 6465. • Idaho, Rev. Codes 1909, §§ 991, 998. • Missouri, Ann. Stats. 1906, § 1230. • Montana, Rev. Codes 1907, § 1448. • New Mexico, Comp. Laws 1897, §§ 1866, 1867. • North Dakota, Rev. Codes 1905, § 4407. • Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 1074; Comp. Laws 1909 (Snyder), § 1413. • Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), §§ 5081, 5084, 5085. • South Dakota, Rev. Codes 1903, C. C. § 568. • Washington, Code 1910 (Rem. & Bal.), § 5721. • Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 1881. • Wyoming, Rev. Stats. 1899, § 3060.

• Arizona, § 3999. On complying with the provisions of the preceding section, said person or persons, or his or their grantees or assigns, shall thereby have and acquire the right and franchise to maintain and operate a toll-road between the termini mentioned in said certificate, and to establish and collect such

rates of toll thereon, as he or they may deem proper, for the term of ten years after the completion of said road, and for such further time as the board of supervisors of the county in which such road is or shall be located, may grant; and the board of supervisors of any county in the territory in which any toll-road

shall have been, or may hereafter be, constructed or maintained, is hereby given and granted power and authority, either before or after the expiration of the term of any franchise or right for the construction or maintenance of any toll-road, or for establishing or taking tolls thereon, to extend the term of any such right or franchise for a further period not exceeding ten years. Provided, however, that in case any franchise has been heretofore extended under any provisions of law heretofore or now in force, then any additional extension granted under the provisions of this act, shall not be for a period which, taken with the extension already granted, shall exceed the said period of ten years. Upon any extension herein provided for being granted said owner, his grantees or assigns, may resume possession and control of such toll-road, if the same shall have been surrendered, and may continue to exercise and enjoy the said franchise and all the rights and privileges therefor for the period of such extension. After the expiration of five years from the time of the commencement of taking tolls on any such road, the county or counties in which it is located shall have the right to purchase any such road at an appraised value to be determined by five appraisers to be selected as follows: Two by the owner or owners, two by the county supervisors of any county in which said road is located wishing to purchase the same, and one by the four appraisers hereinbefore provided for; and their valuation shall be deemed the true value of the road. The rates of toll so established shall be written, printed, or painted in a plain and legible manner on a bulletin board, to be posted at each toll-gate on such road; and if any person who shall construct any toll-road under the provisions of this chapter, or who shall own any interest in any road so constructed, shall demand or collect any higher or greater rates of toll than those specified on said bulletin board, he shall be deemed guilty of a misdemeanor, and, on conviction thereof before any court of competent jurisdiction, shall, for each offense, be punished by fine in any sum not exceeding one hundred dollars, and in default of payment of such fine may, in the discretion of the court, be commit-

ted to the county jail until such fine be paid. One-half of all fines so collected shall go to the informer or prosecutor, and one-half to the school fund of the county; but in no case shall the county be responsible for the costs in any prosecution. All rights, privileges and franchises which may be, or which have heretofore been acquired under or pursuant to the provisions of this chapter or under or pursuant to the provisions of any other law now or heretofore in force, providing for or relating to the construction or maintenance of toll-roads, or the establishing or collection of tolls thereon, may be assigned or transferred, and any transferee or assignee thereof shall have and enjoy all of the privileges and rights and shall be subject to all of the duties of the person or persons originally acquiring the same; and all laws now or heretofore in force, providing for or relating to the construction or maintenance of toll-roads or the establishing or collection of toll rates thereon, shall be construed as having authorized and as authorizing, and all such laws are hereby declared to have authorized, when the same were enacted, the transfer of all such rights, privileges and franchises; and any and all rights, franchises or privileges of every kind heretofore acquired or held under or pursuant to the provisions of any law now or heretofore in force, providing for or relating to the construction or maintenance of toll-roads, or the establishing or collection of toll rates thereon, shall be held and deemed to have been at all times transferable and assignable to the same extent as though the assignment and transfer thereof had at all times been expressly authorized by such law; all deeds, conveyances or agreements heretofore made or executed for the purpose of assigning or transferring or purporting to transfer or assign any such rights, privileges or franchises, shall, for all purposes be held and deemed to have been at all times duly authorized by law, and the same are hereby ratified, approved and confirmed; and the making or execution of any such deed, conveyance or agreement, or the assignment or transfer, or the attempted assignment or transfer, of any such right, privilege or franchise, shall not be held or deemed to have worked at any time a forfeiture or abandonment thereof, or to have been

or to be any ground or cause for the forfeiture thereof. (Amended Mch. 18, 1907, Laws 1907, pp. 72, 73.)

a2 Arizona, § 4005. Whenever any ten taxpayers in any county through which a road is located and constructed under the provisions of this law are convinced that tolls charged on said road are unreasonably high, they shall have the right to petition to the board of county supervisors to have said rate reduced, which petition shall be accompanied by an affidavit setting forth wherein said rates of toll should be reduced, and thereupon the county supervisors shall immediately notify the owners of the road so complained of, who shall select three men to act with the county supervisors, and the six shall select a seventh man, and the seven so selected shall have power to fix the rates of toll to be charged on any road thus complained of, which rates shall not be reduced for a period of five years thereafter, unless at the option of the owners thereof. At the expiration of five years, as mentioned in section 3644, the county or counties through which said road or roads are located shall have the right to purchase the same; the price and mode of payment to be fixed by a board of referees, composed of the same number and selected in the same manner as mentioned in section 3644 of this title: Provided, however, that should no complaint be made of too high rates of toll, the said county or counties shall have the right of purchase, as aforesaid, five years from the date of the completion thereof.

b Colorado, § 6465. The unlawful collection of tolls, or the taking or collection of unlawful tolls, shall be punishable by a fine not less than ten dollars, nor more than one hundred dollars. A suit may be brought before any justice of the peace within the county in which such unlawful toll may have been collected, by any person or persons who may have been compelled to pay such unlawful toll, for the recovery of such unlawful tolls, and for the recovery of such fines as may be imposed by the magistrate or justice of the peace, which fine shall be paid to the complainant in such action.

c1 Idaho, § 991. The road company may bridge any stream or river on the route of their road, when not within the limits prescribed by law for the erection and

maintenance of any other bridge, and in bridging streams used for rafting lumber, the bridge must be so constructed as not to prevent or endanger the passage of any raft forty feet in width.

c2 Idaho, § 988. The board of county commissioners must fix and regulate the rates of toll for all franchises granted under the provisions of this chapter within the limits of their respective counties, having due regard to the cost of construction, magnitude of structure and expenses incident thereto, and in keeping the same in good repair. The board of commissioners must also tax such sum as may appear reasonable, not less than twenty-five dollars nor more than two hundred dollars per annum, for each license granted; and the person or parties to whom such license is granted, must pay to the county treasurer the tax for one year in advance, taking his receipt therefor, and upon the production of such receipt the clerk of the board of commissioners must issue such license, with a statement of the rates of toll as fixed, under seal of the board of commissioners.

d Missouri, § 1230. Whenever five consecutive miles of such road shall have been completed, or if its whole length shall be less than five miles, then when the whole of such road shall have been completed, the directors of such company may erect toll-gates at such points and at such distances from each other as they may deem proper, and exact toll from persons traveling on such road, not exceeding the following rates: For every sleigh, carriage or vehicle drawn by one animal, one and a half cents per mile, and one cent in addition for every additional animal; for every horse and rider, or led horse, one cent per mile; for every twenty sheep or hogs, two cents per mile; and for every twenty head of neat cattle, mules or asses, five cents per mile; and in that proportion for any less number: Provided, that persons living within one mile of any gate shall be permitted to pass the same at half the usual rates.

e Montana, § 1448. The board of county commissioners of each county, through which any toll-road passes or any toll-bridge is situated, shall grant a permit to operate the same and shall fix the rate of toll which may be charged by the owner of such road or bridge for the portion of the road or bridge in each

particular county, which rate shall not be diminished oftener than every two years, and may by order, regulate and govern the amount of weight and number of animals that may be driven on to a toll-road at any one time, and prescribe rules for the government of the draws or swings and attendance of the same, and prescribe penalties for the disobedience of such rules. (Act approved March 2, 1893.)

11 New Mexico, § 1866. That such corporation may, after the completion of such wagon road or any part thereof, and after the completion of any such bridge or ferry for and by the traveling public, apply by petition in writing to the board of county commissioners of the county or counties in or through which such road, bridge or ferry is or has been constructed, for rates, prices and tolls to be charged and collected from the traveling public so using and traveling on such toll-road, bridge or ferry, which petition shall state such facts in reference to a road, bridge or ferry, as will be sufficient to inform the board of commissioners as to enable the commissioners to fix the rates, tolls and charges, equal and just between the corporation owning the road, bridge or ferry and the traveling public using the same, and the rates, tolls and charges so fixed shall remain the same for two years, and at the expiration of each two years, the corporation shall petition as aforesaid for the fixing of the rates, tolls and charges by the board of county commissioners. In case the corporation shall be dissatisfied with the rates, tolls and charges so fixed by the board, it may appeal within ten days from such decision and determination, to the judge of the district court of the county in which the road, bridge or ferry is situated, by paying to the clerk of the probate court of the county in which the matter is pending, one dollar, who shall, upon such payment being made, at once transmit all the papers in the case on file in his office to the clerk of the district court to which the appeal is taken, and the corporation shall then present the matter to the district judge, who shall at once appoint three disinterested citizens and tax payers of the county to examine the road, bridge or ferry, and report their finding and fixing of rates, tolls and charges in writing and

under oath to the said judge, within the time by him to be fixed, and unless it shall appear to the judge that manifest injustice has been done by the persons appointed, he shall approve the report, and the rates so fixed shall remain for the ensuing two years, which commissioners so appointed shall be paid by the corporation so appealing for their services, such sum and on such terms as the judge may allow, together with the other costs incurred by such appeal.

12 New Mexico, § 1867. That any such corporation so constructing, keeping and maintaining any such wagon road, bridge or ferry shall have power and authority to charge, receive and collect the rates, tolls and charges fixed, as aforesaid, from any person or persons, companies or corporations so using such road, bridge or ferry, and to prohibit any such persons from using the same until the rates, tolls and charges are paid or tendered; and any such persons using or attempting to use the same until the rates, tolls and charges are so paid or tendered shall be deemed guilty of a misdemeanor, and on conviction thereof before any justice of the peace having jurisdiction shall be fined in any sum, for each offense, not less than five dollars, nor more than ten dollars, said fine to go to the public school fund of the county.

13 North Dakota, § 4407, substantially same as Cal. Civ. Code, § 514, except in line 6, after "situate" insert "subject, however, to the limitation of rates of ferriage prescribed in the general law upon ferries."

14 Oklahoma, § 1074, same as North Dakota § 4407.

15 Oregon, § 5081. All streams or other waters upon the line of such roads shall be safely and securely bridged, except where the county court of the county wherein the line of such road may cross such streams, or other water, or if such stream or other water from the boundary between two counties, then the county court of either of said counties may authorize the corporation to place a ferryboat upon such stream or other water, to be kept and run for such toll as the county court may prescribe, and in the manner required of ferries established under the general statutes in relation to ferries; or except where such county court may authorize such corporation to connect their road with a

ferry, now or hereafter established over such stream or other water under the general statute in relation to ferries.

12 Oregon, § 5084. The rates of toll that may be charged, collected, and received shall be fixed and established by the county court sitting as a board of commissioners of the county where such road is located or where it has its principal office, at the April term of said court annually, or as soon thereafter as practicable, which order shall be entered of record, and shall distinctly specify the amount of toll that may be charged upon the following items or classes of persons or property: Sheep and hogs; horses, mules, asses, and cattle, whether being driven loose or led; a person other than a footman not traveling in a vehicle; a two-wheeled vehicle loaded or unloaded; a four-wheeled vehicle loaded or unloaded, with two horses, mules, or oxen, and for each additional horse, mule, or ox attached to said vehicle,—to be graded and regulated according to the distance traveled or to be traveled upon such road at so much per mile; and no greater amount shall be charged or received than that fixed by the county court as herein provided.

13 Oregon, § 5085. If a greater amount is charged, demanded, or received than that allowed by the order of the county court as herein provided, said corporation shall forfeit its charter, and it is hereby made the imperative duty of the district attorney of the proper county to prosecute any such corporation for violating the provisions of the laws of the state of Oregon governing such roads, which action or suit is to be brought in the name of the state of Oregon.

1 South Dakota, C. C. § 568, same as North Dakota § 4407.

14 Washington, § 5721, same as Oregon § 5081.

1 Wisconsin, § 1881. Each toll-gatherer of such corporation may detain and prevent from passing through his gate all persons riding, leading or driving animals or carriages subject to toll until

they shall have paid respectively the tolls authorized by law; and every such toll-gatherer who shall unreasonably hinder or delay any traveler after he shall have paid the tolls lawfully demanded or shall demand and receive from any person more toll than by law he is authorized to collect shall for each offense forfeit ten dollars.

15 Wyoming, § 3060. When any three or more persons shall associate to form a company for the purpose of constructing a wagon road under the provisions of this chapter, their certificate of incorporation, in addition to the matters hereinbefore required to be stated therein, shall specify the termini of said road and the route of the same, as near as may be; and the said company shall have the right of way over the line named in the certificate, to erect toll-gates, not to exceed one to every ten miles of road, and to collect toll thereat at the rate prescribed by the county commissioners, or the tribunal transacting county business, upon the application of such corporation, either at or before the time of commencing such road, or after the completion thereof; provided, that such rates of toll shall remain in force and shall be collected from persons traveling such road for two years after the time of completing such road; and thereafter, at the expiration of every two years, the county commissioners or tribunal transacting county business in each county, through which such road passes, shall fix and regulate such rates of toll, but not at higher rates than those originally prescribed; And provided further, That nothing in this chapter shall be so construed as to authorize any corporation formed under the provisions hereof, to locate their road, railroad, ditch or flume, or any part thereof, upon any toll-road previously existing, nor upon any public highway, heretofore, and at the time of the organization of such corporation, used and traveled as such, except it may be necessary to cross such toll-road or public highway; all such rates of toll shall be conspicuously posted at every gate upon such road.

Penalties for trespasses on property of corporation.

California, § 520. Every person who:

1. Wilfully breaks, cuts down, defaces, or injures any mile-stone or post on any wagon, turnpike, or plank road; or,
2. Wilfully breaks or throws down any gate on such road; or,
3. Digs up or injures any part of such road or anything thereunto belonging; or,
4. Forcibly or fraudulently passes any gate thereon without having paid the legal toll;

For each offense forfeits to the corporation injured the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Arkansas, Dig. of Stats. 1904 (Kirby), §§ 1919, 1920. ^b Colorado, Rev. Stats. 1908, C. C. § 6466. ^c Kansas, Gen. Stats. 1905 (Dassler), § 1407. ^d Missouri, Ann. Stats. 1906, § 1233. North Dakota, Rev. Codes 1905, § 4413. Oklahoma, Rev. and Ann. Stats. 1903 (Wilson), § 1080; Comp. Laws 1909 (Snyder), § 1419. ^e Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 5086. South Dakota, Rev. Codes 1903, C. C. § 574. ^f Washington, Code 1910 (Rem. & Bal.), § 5724. ^g Wisconsin, Stats. 1898 (San. & Ber. Ann.), § 1882.

^{a1} Arkansas, § 1919. Every person who shall wilfully break, cut down, deface or injure any mile-stone or post on any turnpike road, or wilfully break or throw down any gate or turnpike on any such road, or anything thereunto belonging, or forcibly or fraudulently pass any gate thereon without having paid the legal toll, for each of such offenses the person thus offending shall forfeit and pay the sum of twenty-five dollars, in addition to the damages resulting from his wrongful act, one-half of the fine aforesaid to go to the benefit of the county, and the other half to the benefit of the corporation thus injured.

^{a2} Arkansas, § 1920. Every person, who, in order to avoid the payment of legal toll, shall with his team, carriage or horse, or with anything else subject to toll, turn out of any such turnpike road or pass any gate thereon on ground adjacent thereto, and again enter on such road, or without entering again on such road, if for the purpose of evading such toll, shall, for each offense, forfeit and pay the sum of ten dollars, one-half of

which to go to the county, and the other half to the corporation injured.

^b Colorado, § 6466. Any person traveling upon any toll-road and refusing to pay toll after such toll shall have been demanded by the regularly authorized toll-gatherer, shall be subject to a fine in any sum not exceeding twenty dollars for such offense, the same to be collected before any justice of the peace in the county wherein such road is located.

^c Kansas, § 1407. If any person or persons using any part of said road, shall, with intent to defraud such company, pass through any private gate or bars, or along other ground near said road, to avoid any toll-gate, or shall falsely represent himself or herself to any toll-gatherer as entitled to exemption from paying toll, or shall make any untrue statement as to the distance he or they shall have traveled or intend to travel on the road, or shall practise any fraudulent means, and thereby lessen or avoid the payment of tolls, each and every person concerned in any such fraudulent practices shall for every such offense forfeit and pay to such company the sum of five

dollars, to be recovered by such company in an action of debt, before any justice of the peace of the county where the offender may be found.

d Missouri, § 1233, same as Kansas G. S. § 1407.

e Oregon, § 5086. Any person traveling upon any road herein mentioned, who shall pass through a gate thereon, without paying the toll legally chargeable thereat, or who shall go around such gate, with intent to avoid the payment of such toll, shall be liable to the corporation for three times the amount thereof, and any corporation which, by its agents or servants, or in any manner, shall illegally collect toll from any person traveling on such road, shall be

liable to such person for three times the amount thereof.

f Washington, § 5724, same as Oregon § 5086.

g Wisconsin, § 1882. Every person traveling on any plank or turnpike road who shall untruly report or refuse to report, when requested by any toll-gatherer on said road, the distance he has traveled or desires to travel thereon, or shall refuse or neglect to pay the legal tolls therefor, or shall run through or forcibly or fraudulently pass any toll-gate on any such road, without paying the legal tolls or to avoid the payment of legal toll shall turn out of such road and pass around any toll-gate and enter again on such road shall forfeit for each offense ten dollars.

Penalty for wilfully or maliciously injuring telegraph or telephone property.

California, § 538. Any person who wilfully and maliciously does any injury to any telegraph or telephone property, mentioned in the preceding section, is liable to the corporation for one hundred times the amount of actual damages sustained thereby, to be recovered in any court of competent jurisdiction. (Kerr's Cyc.Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Alaska, Ann. Codes 1907, Pen. C. (Carter), § 165. **b Arkansas, Dig. of Stats. 1904 (Kirby), § 1899.** **Idaho, Rev. Codes 1909, § 2835.** **c Nevada, Comp. Laws Ann. 1900 (Cutting), §§ 1059, 1077.** **d Oregon, Ann. Codes and Stats. 1902 (Bel. & Cot.), § 2143.** **e Washington, Code 1910 (Rem. & Bal.), § 9316.**

a Alaska, Pen. C. § 165. That if any person shall wilfully and maliciously cut, break, or throw down any pole or any tree or other object used in any line of telegraph, telephone, or system for the transmission of light or power by use of electricity, or shall wilfully and maliciously break, displace, or injure any insulator in use in any such line, or shall wilfully and maliciously cut, break, or remove from its insulators any wire used for any of the purposes above enumerated, or shall, by the attachment of a ground wire, or by any other contrivance, wilfully and maliciously destroy the insulation of such line, or interrupt the transmission of the electric current

through the same, or shall in any other manner wilfully and maliciously injure, molest, or destroy any property or materials appertaining to any such line, or belonging to any telegraph, telephone, electric light or power company, or shall wilfully and maliciously interfere with the use of any telegraph, telephone, electric light or power line, or obstruct or postpone the transmission of any message over any telegraph or telephone line, or procure or advise any such injury, interference, or obstruction, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six

months, or by both such fine and imprisonment, in the discretion of the court, and shall moreover be liable to the company whose property is injured or line obstructed in a sum equal to three times the amount of actual damages sustained thereby.

b Arkansas, § 1899. Any person who shall wilfully and intentionally destroy, injure or obstruct any telegraph or telephone line, or any of the property or materials thereof shall, on conviction thereof, be fined in any sum not less than two hundred dollars, and may be imprisoned for any length of time, not exceeding one year, and pay to the owners of said line double the amount of all the damages sustained thereby.

c1 Nevada, § 1059. If any person shall wilfully or maliciously cut, break, or throw down any telegraph pole, or any tree, or other material used in any line of telegraph; or shall wilfully or maliciously break, displace, or injure any insulator in use in any telegraph line, or shall wilfully or maliciously cut, break, or remove from its insulator any wire used as a telegraph line; or shall, by the attachment of a ground wire, or by any other contrivance, wilfully destroy the insulation of such telegraph line, or interrupt the transmission of the electric current through the same; or shall, in any other manner, wilfully injure, molest, or destroy any property or materials appertaining to any telegraph line; or shall wilfully interfere with the use of any telegraph line, or obstruct, or

postpone the transmission of any message over the same; or procure, or advise any such injury, interference or obstruction, the person so offending shall be deemed guilty of a misdemeanor, and shall be punished by fine not to exceed five hundred dollars, or imprisonment not to exceed six months, or by both such fine and imprisonment, in the discretion of the court; and shall, moreover, be liable to the telegraph company whose property is injured, in a sum equal to one hundred times the amount of actual damages sustained thereby.

c2 Nevada, § 1077. Any person who shall wilfully or maliciously damage or destroy any telephone line, or in any manner interrupt communication over any telephone line, shall be liable for damages and criminal prosecution in the same manner and to the same extent as if the same were a telegraph line.

d Oregon, § 2143, substantially same as Alaska Pen. C. § 165, except, in line 5 after "telegraph," omit "telephone, or system for the transmission of light or power by use of electricity"; also make other necessary changes so as to limit the application of the section to property and appliances of telegraph lines; also in the line next to the last after "equal to" change "three" to "one hundred" before "times."

e Washington, § 9316, substantially same as Cal. Civ. Code § 538, except at the end of line 3, change "one hundred" to "five" before "times."

Actions for forfeiture against homestead corporations.

California, § 562. Homestead corporations must not purchase and sell, or otherwise acquire and dispose of real property, or any interest therein, or any personal property, for the sole purpose of speculation or profit. Nor must any such corporation at any one time own or hold, in trust or otherwise, for its purposes, real property, or any interest therein, which in the aggregate exceeds in cash value the sum of two hundred thousand dollars. For any violation of the provisions of this section, corporations forfeit their corporate rights and powers. On the application of any citizen to a court of competent jurisdiction such forfeiture may be adjudged, and the judgment carries with it costs of the proceedings. (Kerr's Cyc. Civ. Code.)

The following statute treats of the same subject as the foregoing:

• Idaho, Rev. Codes 1909, § 2850.

• Idaho, § 2850, substantially same as Cal. Civ. Code § 562, except near the end of the second sentence change "two hundred" to "fifty" before "thousand."

§ 449. COMPLAINTS [OR PETITIONS].

FORM No. 1051—For penalty. (General form.)

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , the defendant [state acts constituting violation of statute, either following the words thereof or setting forth the facts specifically], against the form of the statute in such case made and provided [or specify the particular statute under which the penalty is claimed].

2. That thereby the defendant became indebted in the amount of [penalty or forfeit] to [naming the one for whose use the penalty is provided]; whereby an action accrued to the plaintiff according to the provisions of [describing statute as the case may require].

Wherefore, plaintiff prays judgment for \$, the amount of said penalty, against defendant, and for costs of suit.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 1052—For penalty for violation of ordinance of board of supervisors.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on or about the day of , 19 , the board of supervisors of the county of , in pursuance of the power in them vested by law, passed a law, entitled, "An order, regulation, or ordinance," [etc., setting out title thereof,] a copy of which is annexed as a part of this complaint [or petition].

2. That since the passage of said law, to wit, on the day of , 19 , the defendant [set out fully wherein the defendant had disobeyed the order], contrary to the provisions of the said law above mentioned.

3. That by reason of the premises, the defendant forfeited to the plaintiff the sum of \$.

[Concluding part.]

FORM No. 1053—For penalty for sale of liquors without license.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That the defendant being a resident of _____, did on the day of _____, 19____, at his house [or shop], known as No. _____ Street, sell to one C. D. [or to divers persons] strong or spirituous liquors or wines in quantities less than [five gallons] at a time, without having a license therefor, as required by the act entitled "An act," [etc., giving full title,] passed on the _____ day of _____, 19____.

2. That thereby the defendant became and is indebted to the plaintiff in the sum and penalty of \$ _____, for said act of selling [or each and every of said acts of selling], whereby this action has accrued to the plaintiff, according to the provisions of said act, for the said sum of \$ _____ [or, if more than one penalty is claimed, for the aggregate amount or sum of \$ _____].

[Concluding part.]

FORM No. 1054—Against witness for disobeying subpoena.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the _____ day of _____, 19____, at _____, the plaintiff caused the defendant to be duly served with a subpoena commanding him to attend as a witness in the _____ court, in and for the county of _____, in this state, on the _____ day of _____, 19____, there to give testimony on behalf of the plaintiff in an action in said court pending, wherein this plaintiff was the plaintiff and one L. M. was defendant.

2. That at the same time the plaintiff caused \$ _____, the lawful fees of the said witness, to be paid [or tendered] to him.

3. That the defendant, not regarding his duty, failed to attend as commanded, whereby the defendant became indebted to the plaintiff in the amount of \$ _____, according to the provisions of the statute, entitled [set out title in full].

4. [Allege special damages, if any.]

5. That by reason of the premises, the defendant forfeited to the plaintiff the sum of \$ _____.

[Concluding part.]

CHAPTER CXXIX.

Specific Performance.

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§ 450. CODE PROVISIONS.

Specific and preventive relief generally.

California, § 3366. Specific or preventive relief may be given as provided by the laws of this state. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

a Montana, Rev. Codes 1907, § 6089. b North Dakota, Rev. Codes 1905, § 6602. c South Dakota, Rev. Codes 1903, C. C. § 2332.

a Montana, § 6089. Specific or preventive relief may be given in the cases specified in this title, and in no others.

b North Dakota, § 6602. Specific or preventive relief may be given in the

cases specified in this and the following two articles and no others.

c South Dakota, Civ. Code § 2332, same as Montana § 6089.

Specific relief, how given.

California, § 3367. Specific relief is given:

1. By taking possession of a thing, and delivering it to a claimant;
2. By compelling a party himself to do that which ought to be done; or,

3. By declaring and determining the rights of parties, otherwise than by an award of damages. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6090. North Dakota, Rev. Codes 1905, § 6603. South Dakota, Rev. Codes 1903, C. C. § 2333.

Preventive relief, how given.

California, § 3368. Preventive relief is given by prohibiting a party from doing that which ought not to be done. (Kerr's Cyc. Civ. Code.)

For preventive relief, see Injunctions, ch. CXXIII.

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6091. North Dakota, Rev. Codes 1905, § 6604. South Dakota, Rev. Codes 1903, C. C. § 2334.

Limitation upon specific and preventive relief.

California, § 3369. Neither specific nor preventive relief can be granted to enforce a penal law, except in a case of nuisance, nor to enforce a penalty or forfeiture in any case. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6092. North Dakota, Rev. Codes 1905, § 6605. South Dakota, Rev. Codes 1903, C. C. § 2335.

Judgment for possession or title of real property.

California, § 3375. A person entitled to specific real property, by reason either of a perfected title, or of a claim to title which ought to be perfected, may recover the same in the manner prescribed by the Code of Civil Procedure, either by a judgment for its possession, to be executed by the sheriff, or by a judgment requiring the other party to perfect the title, and to deliver possession of the property. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6093. North Dakota, Rev. Codes 1905, § 6606. South Dakota, Rev. Codes 1903, C. C. § 2336.

Remedy must be mutual.

California, § 3386. Neither party to an obligation can be compelled specifically to perform it, unless the other party thereto has performed, or is compellable specifically to perform, everything to which the former is entitled under the same obligation, either completely or nearly so, together with full compensation for any want of entire performance. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6098. North Dakota, Rev. Codes 1905, § 6616. South Dakota, Rev. Codes 1903, C. C. § 2340.

Specific performance of unilateral contracts.

California, § 3388. A party who has signed a written contract may be compelled specifically to perform it, though the other party has not signed it, if the latter has performed, or offers to perform it on his part, and the case is otherwise proper for enforcing specific performance. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6100. North Dakota, Rev. Codes 1905, § 6612. South Dakota, Rev. Codes 1903, C. C. § 2342.

Penalty or damages liquidated not a bar.

California, § 3389. A contract otherwise proper to be specifically enforced, may be thus enforced, though a penalty is imposed, or the damages are liquidated for its breach, and the party in default is willing to pay the same. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6101. North Dakota, Rev. Codes 1905, § 6613. South Dakota, Rev. Codes 1903, C. C. § 2343.

Obligations not specifically enforceable.

California, § 3390. The following obligations cannot be specifically enforced:

1. An obligation to render personal service;
2. An obligation to employ another in personal service;
3. An agreement to submit a controversy to arbitration;
4. An agreement to perform an act which the party has not power lawfully to perform when required to do so;
5. An agreement to procure the act or consent of the wife of the contracting party, or of any other third person; or,
6. An agreement, the terms of which are not sufficiently certain to make the precise act which is to be done clearly ascertainable. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

• **Hawaii, Rev. Laws 1905, Organic Act, § 10.** • **Montana, Rev. Codes 1907, § 6102.** **North Dakota, Rev. Codes 1905, § 6614.** **South Dakota, Rev. Codes 1903, C. C. § 2344.**

• **Hawaii, Organic Act, § 10.** * * *
Provided. That no suit or proceedings shall be maintained for the specific performance of any contract heretofore or hereafter entered into for personal labor or service, nor shall any remedy exist or be enforced for breach of any such contract, except in a civil suit or proceeding instituted solely to recover damages for such breach. * * *

• **Montana, § 6102, substantially same**
as Cal. Civ. Code § 3390, except subs. 1 and 2 of Cal. Civ. Code § 3390, are both substantially included in sub. 1, Montana § 6102; and for sub. 2, Montana § 6102, insert, "2. An agreement to marry or live with another."

Parties against whom specific performance cannot be enforced.

California, § 3391. Specific performance cannot be enforced against a party to a contract in any of the following cases:

1. If he has not received an adequate consideration for the contract;
2. If it is not, as to him, just and reasonable;
3. If his assent was obtained by the misrepresentation, concealment, circumvention, or unfair practices of any party to whom performance would become due under the contract, or by any promise of such party which has not been substantially fulfilled; or,
4. If his assent was given under the influence of mistake, misapprehension, or surprise, except that where the contract provides for compensation in case of mistake, a mistake within the scope of such

provision may be compensated for, and the contract specifically enforced in other respects, if proper to be so enforced. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6103. North Dakota, Rev. Codes 1905, § 6615. South Dakota, Rev. Codes 1903, C. C. § 2345.

Parties in whose favor specific performance cannot be enforced.

California, § 3392. Specific performance cannot be enforced in favor of a party who has not fully and fairly performed all the conditions precedent on his part to the obligation of the other party, except where his failure to perform is only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6104. North Dakota, Rev. Codes 1905, § 6616. South Dakota, Rev. Codes 1903, C. C. § 2346.

Agreement to sell property by one who cannot give title.

California, § 3394. An agreement for the sale of property cannot be specifically enforced in favor of a seller who cannot give to the buyer a title free from reasonable doubt. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6106. North Dakota, Rev. Codes 1905, § 6617. South Dakota, Rev. Codes 1903, C. C. § 2347.

Relief against parties claiming under person bound to perform.

California, § 3395. Whenever an obligation in respect to real property would be specifically enforced against a particular person, it may be in like manner enforced against any other person claiming under him by a title created subsequently to the obligation, except a purchaser or encumbrancer in good faith and for value, and except, also, that any such person may exonerate himself by conveying all his estate to the person entitled to enforce the obligation. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6107. North Dakota, Rev. Codes 1905, § 6618. South Dakota, Rev. Codes 1903, C. C. § 2348.

§ 451. COMPLAINTS [OR PETITIONS].**FORM No. 1055—For specific performance of an agreement to make a lease.**

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the defendant, being owner in fee of the following premises [describing the same], duly executed an agreement with the plaintiff, whereby he agreed to lease the same, with the appurtenances, to the plaintiff, for the term of years, from the day of , 19 , on the following conditions: [Set out the same.]

2. That the plaintiff, relying upon said agreement, has expended the sum of \$ in improving said premises, in this: [State what improvements were made.]

3. That the plaintiff has duly performed all the conditions on his part to be performed, and has always been, and still is, ready and willing to accept a lease of said premises, but the defendant has failed and refused, and still refuses, to execute a lease to the plaintiff.

4. That said contract, and the terms and conditions thereof aforesaid, were and are in all respects just and fair and reasonable between the parties thereto.

Wherefore, the plaintiff demands judgment, that the defendant be required to execute to the plaintiff a lease, according to the terms of said agreement, and for such other relief as is just and proper.

[Verification.]

A. B., Attorney for plaintiff.

FORM No. 1056—For specific performance of an agreement to exchange property.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , at , the plaintiff and defendant entered into an agreement, in writing, of that date, whereby, in consideration of the covenants on the part of the plaintiff hereinafter mentioned, the defendant covenanted that he would, on or before the day of , 19 , convey to the plaintiff in fee, by warranty deed, a tract of land situated in the county of , in the state of , bounded and described as follows [giving description]; in consideration whereof, the plaintiff covenanted in and by said agreement to convey to the defendant in fee-simple a certain

house and lot situate in the city of _____, in this state, [describing the same].

2. That the plaintiff duly performed all the conditions of said agreement on his part, and on the _____ day of _____, 19____, at _____, tendered to the defendant a warranty deed of said premises, signed and sealed by the plaintiff, and demanded of him a deed of said premises in _____; but the defendant refused to execute and deliver said or any deed to the plaintiff.

3. [As in paragraph 4, preceding form.]

4. That on the _____ day of _____, 19____, in pursuance of said agreement, the plaintiff delivered, and the defendant took, possession of the premises so to be conveyed to the defendant, and that defendant has ever since occupied, and now occupies, the same.

Wherefore, the plaintiff prays judgment, that the defendant convey to the plaintiff said lot in _____, pursuant to the contract, and for the costs of this action.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 1057—By vendee, to compel specific performance of contract to convey real estate under which possession was given.

(In *Noyes v. Schlegel*, 9 Cal. App. 516; 99 Pac. 726.)¹

[Title of court and cause.]

Comes now the plaintiff above named, and for cause of action against the defendants, alleges:

1. That on the 24th day of February, 1904, the plaintiff and the defendant L. Schlegel entered into a certain contract and agreement, in writing, whereby said defendant agreed to sell and transfer to this plaintiff certain lots, pieces, and parcels of land situate in the county of Los Angeles, state of California, and more particularly described as follows, to wit: [Here follows description of said property], for the sum of \$625, gold coin of the United States, payable in instalments as provided in said contract. * * * A copy of the said agreement of February 24, 1904, is hereunto attached, marked "Exhibit A," and made a part hereof.

¹ This action involved, in addition to property wholly paid for, certain other lots upon which instalments remained unpaid. The defendant contended that he was released from his obligation to convey because the plaintiff had failed to pay some of the instalments within the time limited by the contract. The court held that the defendant had, by express oral agreement, and by the acceptance of overdue payments, and in other ways, waived his right to forfeiture for these defaults or delays in payment: *Noyes v. Schlegel*, 9 Cal. App. 516, 99 Pac. 726, 727.

2. That thereafter, and on the 12th day of July, 1906, the said agreement was duly recorded in the office of the county recorder of the county of Los Angeles, in book 726 of deeds, at page 267 thereof, records of said county.

3. That pursuant to the said agreement the plaintiff went into possession of the said property, and is now in possession thereof, and that plaintiff has made all of the payments on account of the purchase price of [said] lots * * * above described, provided in the said contract to be paid, together with interest on said payments as provided therein. That demand has been made upon the said defendant that he execute and deliver to this plaintiff the deed of conveyance to said lots * * * pursuant to his said contract with plaintiff, but said defendant has refused, and still refuses, to execute the necessary deed of conveyance to the said property, and refuses to carry out his said agreement in reference to the transfer of said lots or either of them. A copy of said demand in writing so served upon the said defendant is hereunto attached, marked "Exhibit B," and made a part of this complaint. * * *

4. That the said agreement of February 24, 1904, was and is a just and equitable contract as between plaintiff and said defendant, and the price therein agreed to be paid by the plaintiff for said lots * * * was the reasonable value thereof at the time the said contract was entered into, and the said contract, at the time of its execution, was, and it now is, a just and equitable and reasonable contract. * * *

5. * * * That the said defendant at all times herein mentioned was, and now is, the legal owner of the title to the said premises above described, and was, and now is, able to transfer to the plaintiff a good and sufficient title to the same; that the defendant Harriett Schlegel is the wife of L. Schlegel, and has, or claims to have, some interest in the said premises, and that said interest is subject to and inferior to the rights of the plaintiff herein; that the defendants John Doe, Richard Roe, Mary Doe, and Jane Roe are sued herein under fictitious names, because the true names of said defendants are unknown to plaintiff; that said last-named defendants have, or claim to have, some interest in the said premises adverse to plaintiff, and plaintiff asks that when their true names are ascertained that he may be allowed to amend his complaint by inserting the same herein.

Wherefore, plaintiff prays judgment and decree of this court:

That the defendant be required to execute to this plaintiff a good and sufficient deed to the said property free and clear of all encumbrances, and that upon a refusal to so execute and deliver said deed a commissioner be appointed by this court to execute such deed, and that such transfer shall operate as a transfer to plaintiff of said premises; * * * that it be adjudged and decreed, that plaintiff is the owner in fee-simple of the said premises, free and clear of all encumbrances, and that defendants and each of them be restrained and enjoined from asserting any right, title, or interest therein or thereto; and for such other and further relief as may be just and equitable, and for costs.

[Verification.]

Kemp & Collier,
Attorneys for plaintiff.

FORM No. 1058—Against administrator of vendor's estate, for specific performance of contract made with decedent.

(In Carr v. Howell, 154 Cal. 372; 97 Pac. 885.)

[Title of court and cause.]

Now comes the plaintiff in the above-entitled action, and complaining of the defendant, for cause of action alleges:

1. That Lelia Dwyer died at the city of New Orleans, in the state of Louisiana, on or about the 22d day of June, 1905, and was at the time of her death a resident of the said city and state, but left real property situated in the city of Los Angeles, county of Los Angeles, state of California.

2. That the said Lelia Dwyer left a will, and prior to the 8th day of August, 1905, the defendant, Wesley Clark, presented his petition to this court, praying that the said will be admitted to probate, and that he, the said Wesley Clark, be appointed administrator of the estate of the said Lelia Dwyer with the will annexed, and such proceedings were had upon the said petition in this court that on the 8th day of August, 1905, an order was duly given and made in this court and in the said proceedings, admitting the said instrument to probate, and appointing the said defendant, Wesley Clark, administrator of the estate with the will annexed, and the said Wesley Clark did thereafter, and on the 9th day of August, 1905, duly qualify as such administrator by giving the bond and taking the oath required by law, and thereupon letters of administration of the estate of the said Lelia Dwyer with the will annexed were duly issued to him, said

Wesley Clark, and he, the said Wesley Clark, ever since has been, and now is, the duly appointed, qualified, and acting administrator with the will annexed of the said Lelia Dwyer, deceased.

3. That during the lifetime of the said Lelia Dwyer, and on or about the 4th day of March, 1905, she was the owner of the following-described parcel of land: [Here follows description of land]; and that she died seized of the said land (subject to the written agreement hereinafter set out). * * *

4. That on or about the 4th day of March, 1905, plaintiff and defendant entered into * * * a certain agreement, in writing, which agreement was and is in words and figures following, to wit: [Here the said agreement is set out.] * * *

5-8. Plaintiff further alleges that he paid to the said Lelia Dwyer, upon and under and in pursuance of said contract, the said sum of \$1,000, as part payment for said tract of land, as recited in said agreement; and prior to the 13th day of May, 1905, to wit, on the 26th day of April, 1905, plaintiff offered to pay unto the said Lelia Dwyer, and tendered to her, * * * the further sum of \$9,000, in cash, and did at the same time offer to deliver the six promissory notes signed by the plaintiff, each in the sum of \$15,000, due respectively on or before one, two, three, four, five, and six years, payable to the said Lelia Dwyer, or her order, [etc., stating the offer to perform the remaining conditions of the contract on the part of the plaintiff to be performed]; * * * that plaintiff then and there was, and ever since has been, and now is, able, ready, and willing, and now offers, to pay all sums of money by him to be paid under the terms of the said written agreement and to deliver the notes and mortgage required thereby to the said defendant upon the execution of the deed of conveyance to the plaintiff as provided in the said agreement [etc.]; * * * but the said Lelia Dwyer failed and refused and neglected to [accept said tender] or deliver such conveyance.

9. [Here follows averment as to tender made to the representative after his appointment and qualifying aforesaid.]

10. Plaintiff further avers that the said sums of money agreed by him to be paid for the said property as in the said contract of March 4, 1905, set forth, and amounting altogether to the sum of \$100,000,

was the full and fair value of the said property at the time the said contract was made. * * *

Wherefore, [etc., following with the prayer].

John S. Chapman, and
Barker & Bowen,

[Verification.]

Attorneys for plaintiff.

§ 452. CROSS-COMPLAINT [OR CROSS-PETITION].

FORM No. 1059—By defendant, to quiet title against plaintiff who sues for specific performance.

(In *Gish v. Ferrea*, 10 Cal. App. 53; 101 Pac. 27.)¹

[Title of court and cause.]

Defendant, J. P. LeFevre, files this his cross-complaint against Mary F. Gish, and alleges:

1. That cross-complainant, J. P. LeFevre, is now, and for a long time has been, the owner, and entitled to the possession, of that certain piece or parcel of land situate, lying, and being in the city and county of San Francisco, state of California, and bounded and described as follows, to wit: [Here follows description of said property.]

2. That said Mary F. Gish claims and asserts an interest therein adverse to cross-complainant, and that the said claim of said Mary F. Gish is without any right whatever, and that said Mary F. Gish has no estate, right, title, or interest whatever in said land or premises, or any part thereof.

[Concluding part as in actions to quiet title generally.]

§ 453. ANSWERS.

FORM No. 1060—Denial of readiness to convey.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that the plaintiff was ready or willing to convey the premises as alleged, or at all; but [state refusal or inability to convey according to the fact].

[Etc.]

¹ The cross-complaint in *Gish v. Ferrea*, supra, was filed with the answer, the latter containing a specific denial of the averments of the complaint, the action being for specific performance.

FORM No. 1061—Denial of payment or tender.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that the plaintiff has ever paid or tendered to the defendant \$, the residue of the purchase money agreed to be paid.

[Etc.]

FORM No. 1062—Demand after plaintiff's tender.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

That after the making of the tender alleged, and on the day of , 19 , at , the defendant requested the plaintiff to pay him said sum, but the plaintiff then and ever since refused to pay the same.

[Etc.]

FORM No. 1063—Denial of title.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that the plaintiff was at the time mentioned, or that at any time since has been, seized of an estate in fee-simple in said premises [or any estate therein], and avers in this connection that plaintiff could not make or procure to be conveyed a good and sufficient title [or any title] thereto to defendant, free and clear of encumbrances, as he had covenanted to make by his agreement with the defendant herein.

FORM No. 1064—Denial of performance.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

Denies that said took possession of the said premises, or made the said improvements thereon alleged, or any improvements thereon, or that defendant has in any manner performed the said contract on his part.

FORM No. 1065—Defense of rescission of contract by agreement of the parties.

[Title of court and cause.]

The defendant answers to the plaintiff's complaint [or petition]:

That after the making of the contract alleged, and before any breach of the same, to wit, on [or about] the day of , 19 , it was agreed by and between the plaintiff and the defendant that said contract should be waived, abandoned, and rescinded; and they then waived, abandoned, and rescinded the same accordingly.

[Etc.]

FORM No. 1066—Defenses—(1) denials, (2) inadequate and unfair consideration and fraudulent representations.—Action for specific performance of contract to convey land.

(In *Cummings v. Roeth*, 10 Cal. App. 144; 101 Pac. 434.)

[Title of court and cause.]

Come now the defendants, and for answer to plaintiff's complaint, allege and deny as follows, to wit:

Defendants deny that on the 26th day of March, 1906, plaintiff, Annie E. Cummings, and defendant George Roeth entered into an agreement, in writing, whereby said Roeth agreed to sell to said Annie E. Cummings the aforesaid property in plaintiff's complaint herein described, or to execute or deliver to her a deed thereof, conveying the same to her free and clear of all encumbrances thereon, in consideration of the sum of \$20,000, in gold coin of the United States, to be paid to him, and the delivering and assignment to him, the said George Roeth, of forty bonds of \$1,000 each of the American Magnesite Company, a corporation, or that said money and bonds said Annie E. Cummings therein agreed to pay, or transfer or deliver, to said Roeth therefor, or that said money and said bonds were then and there a full or adequate consideration or price for said property; or that said contract was in all respects or at all just or reasonable; and in this connection defendants allege that said forty bonds were not of the value of \$1,000 each, or of any market value, and would not be of any value whatever to defendants; and defendants allege that \$20,000 is not a fair, or full, or adequate consideration for said land and premises.

[Here follow other denials of the averments of the complaint conforming to the defense made.]

[Defense of inadequate and unfair consideration and of fraudulent representations.]

For a further and separate answer to plaintiff's amended complaint herein, defendants allege:

1. Defendants, upon their information and belief, allege that the bonds of the American Magnesite Company are not worth their par value, and are of very little or no value, and are of a value, if any, not exceeding \$100 per bond.

2. Defendants allege that on said 26th day of March, 1906, plaintiff represented that the bonds of said American Magnesite Company covered property known as the Rose Brick Company, whereas, in truth and in fact, on said 26th day of March, 1906, said bonds of the American Magnesite Company did not cover or include the Rose Brick Company or any part thereof.

3. That on said 26th day of March, 1906, plaintiff represented that the bonds of said American Magnesite Company were of their face value, that is to say, of the value of \$1,000 per bond, whereas, in truth and in fact, on said 26th day of March, 1906, or at any time since said date, said bonds have not been of any value other than \$100 per bond, and that they are not marketable at \$100 per bond, or at any value whatever, and their value is not capable of any pecuniary estimation.

4. Defendants, upon their information and belief, allege that the plaintiff is, by fraud and false representation, endeavoring to force defendants to convey said premises to plaintiff for an inadequate and unjust consideration, to wit, the sum of \$20,000, and that the pretended forty bonds of the American Magnesite Company are of no value, and do not form any part of the consideration for the conveyance of said property.

Wherefore, defendants pray that plaintiff take nothing by this, her said action, and that defendants may have judgment for costs, and for such other and further relief in the premises as may seem just.

[Verification.]

Welles Whitmore,
Attorney for defendants.

**FORM No. 1067—Defenses—(1) that contract was not fair or reasonable,
(2) withdrawal and rescission of contract.—Action relating to sale of mining property.**

(In *Mitchel v. Gray*, 9 Cal. App. 423; 97 Pac. 160.)

[Title of court and cause.]

Now comes the defendant and answers to the complaint of plaintiffs herein, as follows:

1. Defendant admits that upon July 21, 1905, plaintiff George G. Skillen was the owner of the Lanky Bob quartz-mine, described in plaintiff's complaint, and upon that date executed a contract, a copy of which is set out in said complaint, and marked "Exhibit A."

2. Defendant denies that there was or is any consideration, adequate or otherwise, for said agreement; and denies that said agreement is or was in all respects fair or reasonable, or in any respect fair or reasonable.

3. Defendant denies that plaintiff Charles E. Mitchel has complied with all or any of his covenants under said agreement, said exhibit A; denies that said Mitchel paid the first payment or any payment to plaintiff George G. Skillen, provided for in said agreement; denies that said agreement was, at the commencement of this action, or at any other time, in full force or effect, or that the said contract ever had at any time any force or effect whatever.

4. [Here follow particular averments and denials in support of said defenses:] * * * That on or about October 5, 1905, and prior to any tender to him by plaintiff Mitchel thereunder, said Skillen notified said Mitchel that he revoked and rescinded said agreement, exhibit A, and withdrew from said Mitchel all authority to sell said Lanky Bob mine, such notice being in writing and as follows:

To Charles A. Mitchel: You are hereby notified that I withdraw the option heretofore given you, July 21st, 1905, for the purchase of the Lanky Bob quartz-mining claim, situated in Liberty Mining District, county of Siskiyou, state of California. I have concluded to make other arrangements and not to wait any longer.

Dated October 5th, 1905.

George G. Skillen.

Wherefore, defendant prays that said action be dismissed and for his costs herein incurred.

R. S. Taylor,
Attorney for defendant.

§ 454. JUDGMENTS [OR DECREES].**FORM No. 1068—For plaintiff.**

(In *Noyes v. Schlegel*, 9 Cal. App. 516; 99 Pac. 726.)

This cause coming on regularly for trial on the 6th day of January, 1908, before the court, without a jury, a jury having been expressly waived, John W. Kemp appearing as attorney for the plaintiff, and Frank M. Porter and Trusten P. Dyer appearing as attorneys for the defendants, oral and documentary evidence was introduced on behalf of the plaintiff and the defendants, and the same having been closed, the court files its findings and decisions in writing, and orders judgment in favor of the plaintiff. Wherefore, by reason of the law, and the findings aforesaid:

It is hereby ordered, adjudged, and decreed, that the plaintiff, L. B. Noyes, is the owner in fee-simple, and entitled to a conveyance of lots [here described], and that the defendant be and he is hereby required to execute and deliver to the plaintiff a good and sufficient deed to the said property, conveying the same to the plaintiff free and clear of all encumbrances.

[It is further ordered, adjudged, and decreed, that upon the payment to the said defendant of the sum of \$625 by the plaintiff herein, that the defendant execute and deliver to the plaintiff a good and sufficient deed of conveyance, conveying to the plaintiff lots (here other lots involved in the action are described) free and clear of all encumbrances.]

It is further ordered, adjudged, and decreed, if the said L. Schlegel shall fail, refuse, and neglect to make such conveyance, that the clerk of this court be and he is hereby appointed a commissioner to execute such deed or deeds, and that such transfer when made by such clerk appointed as such commissioner shall operate as a transfer to plaintiff of the said premises.

It is further ordered, adjudged, and decreed, that upon the payment of the said sum of \$625 as aforesaid, and upon the execution of the said deed of conveyance by defendant, or in lieu thereof by the clerk of this court as hereinbefore provided, the defendant be and he is hereby restrained and enjoined from thereafter asserting any right, title, or interest in or to any of the property described in plaintiff's complaint.

It is further ordered, adjudged, and decreed, that the plaintiff do

have and recover of the defendant L. Schlegel his necessary costs and disbursements incurred in this action, taxed at \$34.60.

Dated this 20th day of January, 1908.

George H. Hutton,
Judge of Superior Court.

FORM No. 1069—For defendant.

(In *Cummings v. Roeth*, 10 Cal. App. 144; 101 Pac. 434.)

[Title of court and cause.]

[After preliminary recitals:]

Wherefore, by reason of the law and by the findings aforesaid, it is by the court hereby ordered, adjudged, and decreed, that plaintiff take nothing by her action herein against the defendants, or either of them, and that defendants do have and recover of and from the plaintiff their costs and disbursements incurred herein, amounting to the sum of \$69.

Judgment entered this 4th day of September, 1907.

John P. Cook, Clerk.

By A. A. Rogers, Deputy Clerk.

FORM No. 1070—Decree quieting title of cross-complainant in an action commenced by plaintiff for specific performance.

(In *Gish v. Ferrea*, 10 Cal. App. 53; 101 Pac. 27.)

[Title of court and cause.]

This cause came on regularly to be heard on the 21st day of August, 1907, H. D. Newhouse appearing for plaintiff, and Berry & Brady appearing for defendants, and for cross-complainant, J. P. LeFevre.

The court having heard all the evidence and proofs produced herein, and having considered the same, and being fully advised in the premises, and it appearing therefrom that during the month of September, 1905, defendant Virginia Ferrea was the owner, in possession of, and entitled to the possession of, that certain lot [here follows description of said property].

That on or about the 9th day of February, 1906, by mesne conveyances, the said property was sold to defendant J. P. LeFevre, who was also the cross-complainant herein, and that the said J. P. LeFevre now is, and ever since said 9th day of February, 1906, has been, the owner in fee-simple and entitled to the possession of the

said lot, piece, and parcel of land, together with the improvements thereon; that the claim of Mary F. Gish in and to the said property is without any right whatever, and that the said Mary F. Gish has no estate, right, title, or interest in or to said land or premises or in any part thereof.

It is therefore hereby ordered, adjudged, and decreed, that defendants herein have judgment for their costs in this action, and that plaintiff take nothing by said action.

It is further ordered, adjudged, and decreed, that J. P. LeFevre, the cross-complainant herein, is the owner in fee-simple absolute of the above-described premises and every part thereof, and the improvements thereon, and that Mary F. Gish has no estate or interest in or to said premises or any part thereof, or the improvements thereon, and that the said Mary F. Gish be forever debarred from asserting any claim whatever in or to said land or premises or any part thereof, or the improvements thereon, adverse to the interest of cross-complainant, J. P. LeFevre.

Let judgment be entered accordingly.

Done in open court, this 15th day of April, 1908.

J. M. Seawell, Judge.

§ 455. ANNOTATIONS.—Specific performance.

- 1, 2. Mutuality of remedy.
3. Limitations of the remedy.—Reference.
4. Agreement to give personal services not enforceable specifically.
5. Contract to enforce transfer of corporation stock.
6. Contract for return of stock.—When enforceable.
7. Party can not both rescind and affirm.
8. Action in personam.
9. Right, when negated by the bill itself.
10. Joinder with action for damages.
- 11, 12. Essential averments.—Complaint deficient.
- 13-15. Adequate consideration must be shown.
16. Distinction as between executed and executory contracts.
17. Contracts must be equitable.
- 18-21. Fairness of contract must affirmatively appear.
22. Bill in equity to redeem personal property.
23. Tender.—When unnecessary to plead.
24. Prayer for alternative relief.

1. Mutuality of remedy.—Equity will not enforce a contract where there is want of mutuality in reference to the remedy sought to be enforced: *Los Angeles & B. O. & D. Co. v. Occidental Oil Co.*, 144 Cal. 528, 532, 78 Pac. 25.

2. Specific performance of a contract can not be enforced by a party unless he himself is able to comply with the

conditions of the contract upon which he relies: *Coonrod v. Studebaker*, 53 Wash. 32, 101 Pac. 489, 490.

3. Limitations of the remedy of specific performance of contracts: See *Turley v. Thomas (Nev.)*, 101 Pac. 568, 574-579.

4. Agreement to give personal services not enforceable specifically.—Agreement

of a daughter to support and give personal care and attention to her mother during the remainder of her life in consideration of receiving from the mother a deed of certain property can not be specifically enforced by the mother: *Grimmer v. Carlton*, 93 Cal. 189, 194, 28 Pac. 1043, 27 Am. St. Rep. 171. See *Cooper v. Pena*, 21 Cal. 403; *King v. Gildersleeve*, 79 Cal. 504, 509, 21 Pac. 961.

5. **Contract to enforce transfer of corporation stock.**—A corporation is not a necessary party defendant in an action against a stockholder to specifically enforce a contract to transfer stock to the plaintiff and to compel him to account for and pay over dividends, although it is not improper to make the corporation a defendant: *Sayward v. Houghton*, 82 Cal. 628, 630, 23 Pac. 120.

6. **Contract for return of stock.**—When enforceable. — Specific performance of contract for return of stock in corporation pledged as security for debt may be enforced by the pledgee upon payment or tender of the amount of the indebtedness where the stock has no market value and where no other shares of such corporation are in the market for sale: *Krouse v. Woodward*, 110 Cal. 638, 642, 42 Pac. 1084. See *Senter v. Davis*, 38 Cal. 450; *Adams v. Messinger*, 147 Mass. 185, 17 N. E. 491, 9 Am. St. Rep. 679; *Cushman v. Thayer Mfg. Co.*, 76 N. Y. 365, 32 Am. Rep. 315; *Johnson v. Brooks*, 93 N. Y. 337, 342.

7. **Party can not both rescind and affirm.**—A party can not, while he retains the benefit of a substantial performance, totally defeat an action for the price which he has agreed to pay, or for specific performance on his part, on the ground that the plaintiff has not completed the contract. He can not at the same time affirm the contract by retaining its benefits and rescind it by repudiating its burdens: *German Sav. Inst. v. DeLaVergne R. M. Co.*, 70 Fed. 146, 17 C. C. A. 34, cited in *Turley v. Thomas*, 31 Nev. 181, 101 Pac. 568, 573.

8. **Action in personam.**—An action for specific performance of a contract to convey real estate is one in personam: *Silver Camp Mining Co. v. Dickert*, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940, 3 Am. & Eng. Ann. Cas. 1000; *Close v. Wheaton*, 65 Kan. 830, 70 Pac. 891.

9. **Right, when negatived by the bill itself.**—Where the complaint affirma-

tively shows that the defendant is unknown to plaintiff, the right to specific relief is negatived by the bill itself: *Bell v. Bank of California*, 153 Cal. 234, 239, 94 Pac. 889, citing *Columbine v. Chichester*, 2 Phila. 27; *Roanoke St. R. Co. v. Hicks*, 96 Va. 510, 32 S. E. 295.

10. **Joinder with action for damages.**—The distinction in the English courts between an equitable action for specific performance and an action for damages triable only in a court of law is generally abolished by statute. Under the code, the plaintiff may join an action for specific performance with an action for damages upon the principle that he is entitled to relief in damages where the specific relief can not be granted: *Huey v. Starr*, 79 Kan. 781, 101 Pac. 1075, 104 Pac. 1135, citing Civ. Code, § 10, Gen. Stats. 1901, § 4438; *Henry v. McKittrick*, 42 Kan. 485, 22 Pac. 576.

11. **Essential averments.**—Under section 3391 of the Civil Code of California, the complaint in an action by a vendor against a vendee for the specific performance of an executory agreement for the sale of land, must affirmatively show, first, that the vendee has received an adequate consideration for the contract, and, second, that the contract is, as to him, just and reasonable. Where the complaint is lacking in these essentials it is insufficient: *White v. Sage*, 139 Cal. 613, 87 Pac. 193.

12. **Complaint deficient in essential averments.**—A complaint in an action to enforce specific performance of contract by the vendor in an executory agreement for the sale of land, is insufficient where there is no allegation whatever as to the value of the land, nor any averment that the price was adequate or in fair proportion to the value of the land, nor that the defendant ever had possession of the land, nor of any other facts going to show that the consideration of the contract of the defendant to buy the land was adequate, or that, as to him, it was just and reasonable. A court of equity can not enforce specific performance where the complaint is lacking in these essentials: *White v. Sage*, 149 Cal. 613, 87 Pac. 193.

13. **Adequate consideration must be shown.**—In an action for the specific performance of a contract for the sale of lands, it is necessary to allege and show to the court an adequate consid-

eration for the performance of the contract sought to be enforced: *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778; *Arguello v. Bours*, 67 Cal. 447, 8 Pac. 49; *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386; *Kiger v. McCarthy Co.*, 10 Cal. App. 308, 101 Pac. 928, 929.

14. Specific performance will not be decreed under section 3391 of the California Civil Code unless there is adequate consideration: *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148.

15. A complaint to enforce specifically a contract for the purchase of real estate, but which fails to allege adequacy of consideration for the purchase, may nevertheless be deemed good as an action for damages for the breach of the contract set forth in the complaint, and the full relief sought, except specific performance, may be awarded thereunder: *Kiger v. McCarthy Co.*, 10 Cal. App. 308, 101 Pac. 928, 929.

16. Distinction as between executed and executory contracts.—A distinction as to the rule is made between executed and executory contracts. Where the parties to an executed contract have knowingly and deliberately fixed upon the price, however great or small, there is no occasion for interference by a court; for owners have the right to sell their property for what they please, and purchasers have a right to pay what they please: *Harris v. Tyson*, 24 Pa. 347, 64 Am. Dec. 661; *Davidson v. Little*, 22 Pa. 245, 247, 60 Am. Dec. 81.

17. Contracts must be equitable.—Contracts perfectly valid, free from fraud or mistake, may, nevertheless, be denied specific performance, if harsh, unjust, and unfair. And this doctrine applies equally to vendor and vendee: *White v. Sage*, 149 Cal. 613, 87 Pac. 193; *Cummings v. Roeth*, 10 Cal. App. 144, 101 Pac. 434, 437.

18. Fairness of contract must affirmatively appear.—In a suit for specific performance, it must be affirmatively shown that the contract is fair and just, and that it would not be inequitable to enforce it: *Agard v. Valencia*, 39 Cal. 292, 302; *Newman v. Freitas*, 129 Cal. 283, 288, 61 Pac. 907, 50 L. R. A. 548; *Sharp v. Bowie*, 142 Cal. 462, 467, 76 Pac. 62.

19. A complaint for specific performance, in order to make out a case good

as against general demurrer, must state facts from which the court may determine that the consideration is adequate, and that the contract is as to the defendant just and reasonable: *Herzog v. Atchison etc. R. Co.*, 153 Cal. 496, 501, 95 Pac. 898, citing Cal. Civ. Code, § 3391. See *Agard v. Valencia*, 39 Cal. 292.

20. It is incumbent upon the plaintiff, under the rule that in a suit for specific performance it must be affirmatively shown that the contract is fair and just, to state such facts as will enable the court to decide whether the contract is of such a character that it would not be inequitable to enforce it: *Herzog v. Atchison etc. R. Co.*, 153 Cal. 496, 95 Pac. 898; *White v. Sage*, 149 Cal. 613, 87 Pac. 193; *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148; *Stiles v. Cain*, 134 Cal. 170, 66 Pac. 231; *Prince v. Lamb*, 128 Cal. 120, 60 Pac. 689; *Windsor v. Miner*, 124 Cal. 492, 57 Pac. 386; *Morrill v. Everson*, 77 Cal. 114, 19 Pac. 190; *Nicholson v. Tarpey*, 70 Cal. 608, 12 Pac. 778; *Bruck v. Tucker*, 42 Cal. 346.

21. A complaint looking to the enforcement of a bare legal right to have the defendant comply with the contract of a predecessor, without showing that the contract as originally made was fair and just as between the parties, or that it would be equitable to enforce it, and which fails to show that the recovery of damages for a breach of the contract would not be an adequate remedy, is insufficient for obtaining a decree in specific performance: *Herzog v. Atchison etc. R. Co.*, 153 Cal. 496, 502, 95 Pac. 898. See *Flood v. Templeton*, 148 Cal. 374, 83 Pac. 148, and *Senter v. Davis*, 38 Cal. 450, as to necessity for showing that recovery of damages for a breach of contract would not be an adequate remedy, a condition which is essential to obtain specific performance or any other form of equitable relief.

22. A bill in equity to redeem personal property, held essentially a bill for specific performance: *Angus v. Robinson's Admr.*, 62 Vt. 60, 19 Atl. 993; *Bell v. Bank of California*, 153 Cal. 234, 238, 94 Pac. 889.

23. Tender.—When unnecessary to plead.—It is not necessary to plead a tender where the complaint shows that the defendant had refused to carry out the terms of the contract, and that a tender would have been useless: *Long*

v. Needham, 37 Mont. 408, 96 Pac. 781, 736; Finlen v. Heinze, 32 Mont. 354, 80 Pac. 918; Christiansen v. Oldrich, 30 Mont. 446, 76 Pac. 1007.

24. Prayer for alternative relief.—In an action for specific performance of a contract, it is quite customary and

proper for the plaintiff to ask for alternative relief, either for damages or for appraisement of the value of that which may be decreed and of that which may not: Huey v. Starr, 79 Kan. 781, 101 Pac. 1076, 1077, citing Henry v. McKittrick, 42 Kan. 485, 22 Pac. 576.

CHAPTER CXXX.

Revision or Reformation of Contracts.

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§ 456. CODE PROVISIONS.

When contract may be revised.

California, § 3399. When, through fraud or a mutual mistake of the parties, or a mistake of one party, which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved, so as to express that intention, so far as it can be done without prejudice to rights acquired by third persons, in good faith and for value. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6108. North Dakota, Rev. Codes 1905, § 6619. South Dakota, Rev. Codes 1903, C. C. § 2349.

Presumption as to intent of parties.

California, § 3400. For the purpose of revising a contract, it must be presumed that all the parties thereto intended to make an equitable and conscientious agreement. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6109. North Dakota, Rev. Codes 1905, § 6620. South Dakota, Rev. Codes 1903, C. C. § 2350.

Scope of inquiry on revision.

California, § 3401. In revising a written instrument, the court may inquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the inquiry what the language of the instrument was intended to be. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6110. North Dakota, Rev. Codes 1905, § 6621. South Dakota, Rev. Codes 1903, C. C. § 2351.

Specific enforcement of revised contract.

California, § 3402. A contract may be first revised and then specifically enforced. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6111. North Dakota, Rev. Codes 1905, § 6622. South Dakota, Rev. Codes 1903, C. C. § 2352.

§ 457. COMPLAINTS [OR PETITIONS].

FORM No. 1071—For reformation of a deed for mistake. (General form.)

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , in consideration of \$, the defendants sold to the plaintiff the following-described premises: [Give correct description of same.]

2. That on said day the defendant executed and delivered to the plaintiff a deed, which both parties supposed conveyed the said premises to the plaintiff, whereas the description of the premises in said deed was by mistake made as follows: [Give description as it appears in the deed.]

Wherefore, the plaintiff prays that said deed may be reformed so as to describe said premises properly, and for such relief as is proper.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 1072—To correct and reform a deed to lands for mutual mistake.

(In Home and Farm Co. v. Freitas, 153 Cal. 680; 96 Pac. 308.)

[Title of court and cause.]

Plaintiff for the cause of action against defendant alleges:

1. That plaintiff is, and at all times hereinafter mentioned was, a

corporation organized and existing under the laws of the state of California.

2. That on the 1st day of April, 1903, plaintiff was the owner in fee of a tract of land situated in the county of Marin, state of California, consisting of 171 acres, and particularly described as follows: [Here follows description.]

3. That on the 1st day of April, 1903, plaintiff agreed to sell, and defendant agreed to purchase, said tract of 171 acres, * * * at the agreed purchase price of \$8,633.82.

4-8. [Here follow averments as to the mutual mistake of the parties as to the extent and boundaries of said land, and the mistake in the plat and description thereof in the deed.] * * * and because of such mistake and incorrect delineation the tract of land included within the boundary lines delineated and shown upon said plat, and described in said deed to defendant, consisted of 187 acres instead of 171 acres, as both plaintiff and defendant believed at the time of the execution and delivery of said deed, and because of such mistake in said plat the said deed by plaintiff to defendant conveyed sixteen acres in excess and outside of the true boundary line of said tract of 171 acres.

9. That the sixteen acres of land in excess of said tract of 171 acres, erroneously and by mistake conveyed by plaintiff to defendant as aforesaid, is particularly described as follows: [Here follows description of lands conveyed by mistake.]

10. That plaintiff was at the date of the execution and delivery of said deed the owner of the fee-simple title to the said tract of sixteen acres in the last preceding paragraph particularly described.

11. That plaintiff did not discover or become aware of the mistake * * * in delineating the boundary lines of said tract of 171 acres upon said plat as aforesaid, nor of the mistake thereby made in said conveyance to defendant, until the 8th day of April, 1903; that immediately upon discovery of said mistake plaintiff notified defendant thereof, and demanded of defendant that said mistake be corrected, and that defendant reconvey to plaintiff the said sixteen acres erroneously, and by mistake, conveyed to defendant as aforesaid, and plaintiff offered to prepare, and did prepare, the necessary deed reconveying to plaintiff the said sixteen acres of land, and also prepared a new deed conveying to defendant by proper and accurate description the said tract of 171 acres, and

offered to execute and deliver the same to defendant at its own expense, in exchange for defendant's deed reconveying to plaintiff the sixteen acres of land conveyed to defendant by a mistake as aforesaid, and plaintiff was, ever since has been, and now is ready and willing to prepare and cause to be executed at its expense all conveyances necessary to correct and rectify the said mistake and error in the description of said tract of land as aforesaid; but defendant refused, and still refuses, to reconvey said sixteen acres of land to plaintiff, or to correct said mistake in any respect.

12. That said sixteen acres of land erroneously and by mistake conveyed by plaintiff to defendant as aforesaid was and is of the value of \$60 per acre.

Wherefore, plaintiff prays judgment: That the said deed of April 1, 1903, be reformed and corrected so as to express the true intent and meaning of the parties thereto; that it be adjudged and decreed that plaintiff is the owner in fee-simple of the land and premises described in the ninth paragraph of this complaint; and that plaintiff have and recover its costs from defendant; and for such other and further relief as may be agreeable to equity.

Wm. Singer, Jr., and
Guy Shoup,

[Verification.]

Attorneys for plaintiff.

FORM No. 1073—To reform written instrument, and for specific performance of instrument as reformed.

(Adapted from *House v. McMullen*, 9 Cal. App. 664; 100 Pac. 344.)

[Title of court and cause.]

Now comes the plaintiff, and for cause of action against the defendant alleges:

1. That at all of the times hereinafter mentioned plaintiff was, and is now, the owner, seized in fee, in the possession, and entitled to the possession, of all that certain real property lying, being, and situate in the county of Fresno, state of California, particularly described as follows, to wit: [Here follows description of property owned by the plaintiff.]

2. That at all times hereinafter mentioned the defendant was, and is now, seized in fee and in the possession of all that real property lying, being, and situate in the county of Alameda, state of Califor-

nia, particularly described as follows, to wit: [Here follows description of property belonging to defendant.]

3. That on the 5th day of November, 1906, the plaintiff and defendant made and entered into a certain contract and agreement in writing, which said contract and agreement was and is in the words and figures following, to wit: [Here follows agreement as entered into between the parties.]

4. That on the 6th day of November, 1906, the following words and figures were written on the back of said written agreement, to wit: "J. H. House hereby agrees to assume a certain mortgage on the Berkeley property of \$2,000, interest paid to November 1st, 1906. [Signed] J. H. House."

That said words so written on the back of said agreement were intended to be, and in fact constitute, an integral part and portion of said written agreement [and the consideration thereof] hereinbefore set out, and one of the covenants and stipulations of said agreement upon the part of this plaintiff to be done and performed.

6. That at and before the making and execution of said written contract and of the endorsement thereon by this plaintiff, this plaintiff and the defendant intended that said instrument should mean, and that the legal consequences thereof should be, as follows, to wit: [Here is set out the agreement as plaintiff alleges the same was intended.]

7. That, through a mutual mistake of plaintiff and the defendant, the parties to said written contract hereinbefore first alleged and set out, the said written contract did not, and does not, truly state or express the intention of the said parties, and does not truly express or set out what were intended to be the legal consequences of said written contract in this, to wit: [Here are set out the particulars in which the contract, as entered into, is alleged to be deficient or incorrect.]

8. That this plaintiff has offered to perform all of the conditions of said contract on his part to be done and performed, and is now ready, and at all times has been ready, to perform all conditions in said contract on his part to be done and performed.

9. [Here follow specifications of offers and tenders made by the plaintiff to the defendant in conformity with the contract, as the same is proposed to be reformed, of demand for a reconveying deed,

and of the refusal of defendant to accept tender or convey back the property so conveyed by mistake.]

10. * * * That said contract so made and entered into by plaintiff and defendant is in all respects just, reasonable, and equitable, and the price agreed by this plaintiff to be paid for the property situate in the town of Berkeley, and so owned and held by said defendant, and by him agreed to be conveyed to the plaintiff, is adequate, just, and reasonable; * * * that for the failure and refusal of said defendant to do and perform the terms and conditions of said contract upon his part to be performed this plaintiff can receive no adequate compensation in damages; wherefore, the plaintiff seeks specific performance of all the terms and conditions of said contract.

11. That this plaintiff is now ready, and at all times has been ready, to do and perform all the covenants, stipulations, and agreements of said contract upon the part of this plaintiff to be performed; and plaintiff now offers to do and perform all of such covenants, terms, stipulations, and conditions, and submits himself to the order, judgment, and decrees of this court in the premises.

[Concluding part.]

Form of petition in an action for the reformation of a contract: *Mumper v. Kelley*, 43 Kan. 256, 257, 23 Pac. 558, 559.

§ 458. ANNOTATIONS.

Correction of mistake of record.—Action on the ground of fraud or mistake must be brought within five years from the time of the discovery of such fraud or mistake, under the Iowa statute. But such statute has no reference to an action to correct any evident mistake in a record, which mistake consisted in the failure to properly describe certain property in a formal order of sale entered in probate. The right of the court to correct an evident mistake in its record is inherent, and this right is not forbidden by the statute, nor affected by the mere lapse of time: *Lambert v. Rice*, 143 Iowa 70, 120 N. W. 96, 97, citing Iowa Code §§ 244, 288; *Fuller v. Stebbins*, 49 Iowa 376; *Shelley v. Smith*, 50 Iowa 543; *Hofacre v. City of Monticello*, 128 Iowa 239, 103 N. W. 488.

Mistake must be mutual to entitle to relief.—It is a general doctrine in equity that a mistake common to both is an indispensable element to the reformation of a contract. By the same suit in equity, a contract may be reformed and also specifically enforced, but reformation will not be decreed, and the bill will be bad in that regard, unless elements necessary to the application of that equitable doctrine are pleaded as grounds for the relief: *Meek v. Hurst*, 223 Mo. 688, 122 S. W. 1022, 1024.

An averment in an action to reform an agreement for the sale of real property, "that parties to said memorandum and agreement intended to insert therein a description, * * * but by mistake in drawing said memorandum * * * the description of said lot or personal property was therein set forth incorrectly," mentioning the particulars, and stating definitely the mistake and how it was made, is sufficient in the absence of a demurrer thereto to show that the mistake was a mutual mistake of the parties: *Newton v. Hull*, 90 Cal. 487, 27 Pac. 429.

Complaint to reform a deed on ground of mistake.—The substance of a complaint in a recent action, in which the judgment for plaintiff was affirmed, is as follows: Plaintiff alleges that on the 2d day of November, 1893, defendant was the owner of certain lands in Mendocino County, consisting of 200 acres, which are described in paragraph 1 of the complaint; that on said date the defendant agreed to sell, and did sell, said real property to one Mrs. Louise D. Milks; "that on the said 2d day of November, 1893, the defendant made, executed, and delivered his deed of conveyance, intending to convey and describe the lands hereinbefore, in paragraph 1 of this complaint, set forth and described, and no other, and said Mrs. Louise D. Milks received said deed fully believing that said deed conveyed the lands which she had purchased, to wit, the real property described in paragraph 1 of this complaint, and no other; that by a mistake of both parties to said instrument the said deed of conveyance did not truly or correctly describe the premises sold and intended to be described therein and thereby; that said deed of conveyance described certain of the property intended to be conveyed, but failed to include within the description certain other lands intended to be described therein. [Then follows a copy of the conveyance as it was executed. The manner in which the mistake occurred is also fully set forth, it being alleged that the same was due to the carelessness of the scrivener in writing the word "of" instead of the word "and" in the following portion of the description: N. $\frac{1}{2}$ of the S. E. quarter and the S. E. quarter of the N. E. quarter of section 21," thereby causing to be conveyed 115 acres less than was intended by the parties.] That thereafter, to wit, on the 11th day of December, 1905, the said Mrs. Louise D. Milks had not discovered the said mistake, and on the said date for a valuable consideration sold to plaintiff herein the lands hereinbefore, in paragraph 1 of this complaint, described; that in making out and executing the deed of conveyance of said lands by the said Mrs. Louise D. Milks to this plaintiff, the scrivener drafting said instrument used the deed of conveyance containing the erroneous description from defendant to the said Mrs. Louise D. Milks." The same mistake was made, the parties believing that the land intended to be conveyed was properly described. The plaintiff did not discover said mistake until about the first of November, 1906. Desiring to sell said property, he had an abstract prepared for the intending purchaser. The attorney who examined said abstract noticed the mistake and called it to the attention of plaintiff, who had, up to that time, fully believed that the aforesaid deeds correctly and truly described the lands actually purchased and paid for and intended to be conveyed by said grantors. The plaintiff immediately demanded of defendant Walton, and of the said Mrs. Louise D. Milks, that each of them execute to plaintiff a new deed to said premises correcting said mistake. Mrs. Milks did so, but "the defendant refused, and still refuses, to either make, execute, or deliver a new or corrected deed to said premises, and refused, and refuses, in any manner to correct said mistake." It is expressly averred that the defendant accepted payment in full for all the land intended and believed to be conveyed by said deed of November 2, 1893: *Hart v. Walton*, 9 Cal. App. 502, 99 Pac. 719.

Jury's Pl.—113.

CHAPTER CXXXI.

Rescission.

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§ 459. CODE PROVISIONS.

When rescission may be adjudged.

California, § 3406. The rescission of a written contract may be adjudged, on the application of a party aggrieved:

1. In any of the cases mentioned in section sixteen hundred and eighty-nine; or,
2. Where the contract is unlawful, for causes not apparent upon its face, and the parties were not equally in fault; or,
3. When the public interest will be prejudiced by permitting it to stand. (Kerr's Cyc. Civ. Code.)

For section 1689, referred to in the above section, see ch. XXI, p. 310.

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6112. North Dakota, Rev. Codes 1905, § 6623.
South Dakota, Rev. Codes 1903, C. C. § 2353.

Rescission for mistake.

California, § 3407. Rescission cannot be adjudged for mere mis-
take, unless the party against whom it is adjudged can be restored

to substantially the same position as if the contract had not been made. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6113. North Dakota, Rev. Codes 1905, § 6624. South Dakota, Rev. Codes 1903, C. C. § 2354.

Judgment as against party seeking rescission.

California, § 3408. On adjudging the rescission of a contract, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

* Montana, Rev. Codes 1907, § 6114. North Dakota, Rev. Codes 1905, § 6625. South Dakota, Rev. Codes 1903, C. C. § 2355.

* Montana, § 6114, substantially same as Cal. Civ. Code § 3408, except in the last line, after "compensation," insert "or restoration."

§ 460. COMPLAINTS [OR PETITIONS].

FORM No. 1074—To rescind for fraud.

[Title of court and cause.]

The plaintiff complains of the defendant, and alleges:

1. That on the day of , 19 , the plaintiff was the owner in fee-simple and possessed of the following lands and tenements, situate and lying in the county of , in this state, and bounded and described as follows: [Give description of same.]

2. That the defendant, by fraud, procured and induced the plaintiff to execute and deliver to the defendant a deed of said premises, conveying the same to the defendant in fee, by fraudulently representing to the plaintiff that said deed of conveyance was a mere lease of said premises to the defendant for the term of years, and the plaintiff relying upon said representations of the defendant, and being unable because of blindness [or other defect, or state other circumstances of fraud], did execute and deliver the same as and for, and believing it to be, such lease, and for no other purpose whatever.

Wherefore, the plaintiff prays that the said deed be ordered to be delivered up and canceled, and that plaintiff have such other relief as may be just and his costs herein.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 1075—To rescind for mistake, and to recover payment made in escrow.—Stating cause also in common count for money had and received.

(In *Johnson v. Withers*, 9 Cal. App. 52; 98 Pac. 42.)

[Title of court and cause.]

[Introductory part.]

1. That at all the times herein mentioned the defendant State Bank and Trust Company of Los Angeles was, and now is, a banking corporation organized under the laws of the state of California.

2. That on or about June 19, 1906, plaintiffs entered into a parol contract with defendant Withers, whereby plaintiffs undertook and agreed to purchase of and from said Withers for mining purposes a quantity of land located in the county of Riverside, state of California, described as follows, to wit: [Here follows description of said lands.]

3. That the purchase price for said interest in said lands was to be \$20,000, payable as follows: \$1,000 cash on the making of the agreement; \$9,000 on or before July 5, 1906; and \$10,000 on or before August 5, 1906; that it was further agreed by and between plaintiffs and said Withers that said Withers should immediately deposit his deed to said above-described property with the defendant State Bank and Trust Company of Los Angeles, said deed to be held by said company in escrow until the purchase price of property shall be fully paid; that plaintiffs should make all payments to said State Bank and Trust Company of Los Angeles, said amounts so paid to be held by said company as deposits for the parties until the time that the purchase price should be fully paid.

3. That pursuant to said contract so made as aforesaid plaintiffs, on or about June 19, 1906, paid to said State Bank and Trust Company of Los Angeles the sum of \$1,000, and said State Bank and Trust Company accepted such payment, and receipted therefor, with full knowledge of the terms and conditions of plaintiffs' said contract with defendant Withers.

4. That in order to induce plaintiffs to enter into the above-mentioned contract defendant Withers stated and represented to plaintiffs that said property was of great value by reason of the presence thereon of a valuable mineral substance known as magnesite; * * * that said deposit had been discovered by means of certain shafts, and that he, the defendant Withers, had caused said property to be carefully examined by an expert engineer and mineralogist, and caused the quality and quantity of magnesite discovered in place to be examined and reported upon by said expert, and that said expert examined the said magnesite in place on said property and reported the value and amount thereof at the sum of \$50,000.

5. That plaintiffs, and each of them, relying entirely upon the said representations of defendant Withers hereinbefore set out, and upon the judgment and conclusion of the above-named expert, and induced thereby, entered into a contract with defendant Withers to purchase the above-described property.

6. That on or about June 29, 1906, and subsequent to the making of said contract and to the payment of said sum of \$1,000 to the defendant State Bank and Trust Company of Los Angeles, plaintiffs procured a copy of said report of said expert concerning the above-described property, and plaintiffs then discovered that said expert had made a mathematical error in his computation of the quantity of said magnesite discovered in place on such property, and that the true value of the magnesite, according to the judgment of said expert as deduced from his figures, was \$5,000, instead of \$50,000, and said expert admitted to plaintiffs that he had erred in his computation as above set out; that immediately after making such discovery plaintiffs notified defendants thereof and gave notice that the plaintiffs would refuse to proceed with the contract to purchase the property hereinabove described; and on or about July 3, 1906, plaintiffs served on defendants, and on each of them, formal notice of their election to rescind said contract by reason of such misrepresentation and mistake, and plaintiffs further offered to deliver to said Withers everything of value received from him, and further demanded payment of said sum of \$1,000 held in escrow by the defendant State Bank and Trust Company of Los Angeles; but that defendants, and each of them, then refused, and still refuse, to pay to plaintiffs said sum of \$1,000, or any part thereof.

For a second cause of action plaintiff alleges:

1. [Here follows averment as to incorporation of defendant company.]

2. That on or about June 19, 1906, in the county of Los Angeles, state of California, defendants, State Bank and Trust Company of Los Angeles and W. S. Withers, received from plaintiffs, to and for the use and benefit of plaintiffs, the sum of \$1,000, which sum defendants, and each of them, promised to pay to plaintiffs on demand.

3. That thereafter and prior to the commencement of this action plaintiffs demanded of defendants, and each of them, payment of said money, but defendants have not paid the same, nor any part thereof, and the whole amount is now due and wholly unpaid.

Wherefore, plaintiff prays judgment for \$1,000, with interest thereon from July 3, 1906, together with the costs of this action.

Cryer & Tuttle,
Attorneys for plaintiffs.

[Verification.]

FORM No. 1076—Cross-complaint in action to rescind contract for purchase of real estate, and to recover portion of purchase price paid.

(In Kornblum v. Arthurs, 154 Cal. 246; 97 Pac. 420.)

[Title of court and cause.]

The defendant complains of the plaintiff, and for cause of action, and by way of cross-complaint, alleges:

1. [After allegation of incorporation:] * * * that on the 14th day of November, 1904, the said Abbot-Kinney Co. made, executed, and delivered to one Fanny M. Kelley a certain agreement of sale of real estate, in words and figures following, to wit: [Here follows a copy of said agreement of sale, the same being declared upon in the complaint, and which agreement plaintiff seeks to have rescinded.]

2. That on the 18th day of April, 1905, the said Fanny M. Kelley duly sold and assigned all her right, title, and interest in and to said agreement of sale to this defendant, who ever since has been, and now is, the legal owner and holder thereof.

3. That on the 6th day of July, 1905, the plaintiff and the defendant, Mary M. Arthurs, agreed together as follows: That the defendant, Mary M. Arthurs, would sell, and the plaintiff would buy, all her interest under said agreement for the sum of \$12,470, to be paid as follows: \$1,000 at the date of said agreement; \$2,000 on the 28th

day of July, 1905; and \$9,470 on or before the 1st day of November, 1905, said last-named payment to bear interest at the rate of seven per cent per annum from the 28th day of July, 1905, until paid; and the plaintiff, under and by virtue of said agreement, also undertook and agreed to pay the two deferred payments mentioned in said agreement of sale between the Abbot-Kinney Co. and Fanny M. Kelley, which became due on the 14th day of November, 1906; that plaintiff paid to the defendant the \$1,000 aforesaid, and the \$2,000 aforesaid, and on said July 28, 1905, took possession of the premises described in said contracts, and has failed and refused to pay any portion of the \$9,470, or the interest thereon, and has also failed and refused to pay the payment which became due to the Abbot-Kinney Co. under said agreement, on November 14, 1905, and this defendant, for the purpose of preventing forfeiture under said Abbot-Kinney Co.'s contract was compelled to, and did, on the 16th day of November, 1905, pay said payment, with the interest thereon, amounting to the total of \$1,337.50.

4. That this defendant is now, and ever since the making of this contract between this defendant and plaintiff has been, ready and willing to comply with said agreement in every part and particular, and before the bringing of this action offered to, and still offers to, comply with that portion of the agreement to be by her performed, on the performance by said plaintiff of his portion of said agreement.

5. That this defendant has duly performed all the conditions on her part under said agreement between herself and plaintiff.

Wherefore, this defendant prays judgment against the plaintiff: That there is now due from the plaintiff to this defendant, under said agreement, the sum of \$10,808.33, with interest on \$9,470, at the rate of seven per cent per annum, from the 28th day of July, 1905, and with interest on \$1,337.50 thereof, at the rate of seven per cent per annum, from November 16, 1905; that the court fix a date on or before which plaintiff shall pay such sums of money, and, on a failure to pay the same, that plaintiff be foreclosed of all right under said agreement to purchase. This defendant prays for general relief and costs of suit.

Tanner, Taft & Odell,

Attorneys for defendant, Mary M. Arthurs, cross-complainant.

[Verification.]

§ 461. ANSWER.

FORM No. 1077—Defense of no consideration and of matters that would justify a decree of rescission.

(In *Dunlap v. Plummer*, 1 Cal. App. 426; 82 Pac. 445.)

[Title of court and cause.]

Comes now the defendant, and, answering plaintiff's complaint on file herein, for himself, and not for his co-defendant, alleges:

1. That there was no consideration received by this defendant for the execution of the note declared upon in this action, and that the said Wight, assignor of the plaintiff, did not part with anything of value or suffer any detriment by reason of the fact that this defendant signed said note; that the plaintiff paid no consideration for said assignment to him of said note.

2. And further answering said complaint, this defendant avers that at and prior to the time of the execution of said note one Frank O. Wakely was the agent of Richard H. Wight, the payee therein named, and had theretofore, as plaintiff is informed and believes, and therefore states, been selling real estate of the said Wight, and collected the money from said sales, and had not accounted for the full amount received; that the said Wakely was at that time, and ever since has been, insolvent, with little capacity to earn money, all of which facts were well known to his said principal, Richard H. Wight; that in order to cover the deficiency due from the said Wakely to the said Wight as aforesaid, the said note was made up by the defendant Wakely in his office, and signed by this defendant at the request of said Wakely and the said Wight; that at that time the defendant had no knowledge of the financial condition of the said Wakely, or that the note was being given for a previous debt from the said Wakely to said Wight; that the said Wight well knew that the said defendant was acting in ignorance of the transaction, and that the said defendant would have to pay the said note if he signed it, by reason of the insolvency of the said Wakely as well as his incapacity to earn money.

3. [Here follow averments "for a further answer," to the effect that at the time of the signing of said note the defendant Plummer, the maker, was physically and mentally incapacitated, owing to sickness of a long standing, from transacting any business or entering into any contract. The absence of the strengthening, and otherwise essential, averment that the parties with whom the defendant Plum-

mer was dealing knew of such incapacity is supplied in the following:] * * * that defendant received no consideration for the same, and, as he now ascertains, was wholly unacquainted with either the said Wight or the said Wakely; that this defendant did not at said or any time receive any consideration whatever for the signing of said note; that by reason of said incapacity of this defendant during said period, and particularly at the time of the signing of said note, defendant avers that he did not execute the note set out in the complaint herein, inasmuch as he was not capable at said time of comprehending and understanding the nature of the obligations of the contract he was entering into or the liability he was incurring thereby.

Wherefore, this defendant prays, that plaintiff take nothing as against this defendant, and that this defendant have judgment for his costs and reimbursements in this action expended, and for such other relief as may be proper in the premises.

Dunnigan & Dunnigan,

[Verification.]

Attorneys for defendant.

§ 462. JUDGMENT [OR DECREE].

FORM No. 1078—For defendant and cross-complainant.—Action to rescind contract for purchase of real estate, and to recover portion of purchase price paid.

(In Kornblum v. Arthurs, 154 Cal. 246; 97 Pac. 420.)

[Title of court and cause.]

This cause came on regularly to be heard on the 26th day of November, 1906, before the court sitting without a jury, a jury trial having been duly and legally waived, David Goldberg, Esq., and Clarence Meily, Esq., appearing as counsel for plaintiff, and Tanner, Taft & Odell for defendant, Mary M. Arthurs. Said action was tried upon the complaint of plaintiff, the answer of defendant, Mary M. Arthurs, the cross-complaint of the defendant, Mary M. Arthurs, and the answer thereto by the plaintiff, and the evidence being closed, the cause was submitted to the court for its decision, and the court having filed its decision, in writing, in which it orders judgment according to the prayer of the cross-complaint and for the defendant, as against the original complaint. Wherefore, by reason of the law and the foregoing:

It is ordered, adjudged, and decreed, that plaintiff take nothing by his complaint filed herein, and said complaint be hence dismissed; and it is further ordered and adjudged, that there is due under the terms of the contract set out in the cross-complaint to the defendant, Mary M. Arthurs, from the plaintiff, the following sums: [a] the sum of \$9,470, with interest thereon, at the rate of seven per cent per annum, from the 28th day of July, 1905, and [b] the further sum of \$1,337.50, with interest thereon, at the rate of seven per cent per annum, from the 16th day of November, 1905. And it is further adjudged, that the plaintiff pay unto the defendant, Mary M. Arthurs, said several sums, with interest as aforesaid, up to the time of payment, within ten days from the entry of this judgment. And on failure to so pay, then it is ordered, adjudged, and decreed, that the said plaintiff be forever foreclosed and debarred from claiming any right, title, or interest in the contract set up in the cross-complaint or the real property described therein. It is further ordered and adjudged, that the defendant, Mary M. Arthurs, do recover from the plaintiff, M. S. Kornblum, her costs and disbursements herein, amounting to the sum of \$61.50.

Dated this 30th day of April, 1906.

J. S. Noyes,
Judge of Superior Court.

§ 463. ANNOTATIONS.—Rescission.

1. Rescission an equitable remedy.
- 2, 3. Rescission for fraud or mistake.
4. Relief administered irrespective of form of action.
- 5, 6. Petition, when insufficient.
7. Pleading defense of rescission in the alternative.

1. Rescission an equitable remedy.—Complete and full justice is a fundamental doctrine of equity jurisprudence, and if damages, as well as rescission, are essential to accomplish full justice, they will both be allowed: *Holland v. Western B. & T. Co.* (Tex. Civ. App.), 118 S. W. 218; *Wintz v. Morrison*, 17 Tex. 372, 67 Am. Dec. 658.

2. Rescission for fraud or mistake.—The rule supported by the weight of authority is that the facts pleaded must show a case of fraud and mistake, or fraud or mistake, in the complaint in order to entitle the complainant to relief upon either ground which the evi-

dence may establish: *Clemens v. Clemens*, 28 Wis. 637, 9 Am. Rep. 520; *Leighton v. Grant*, 20 Minn. 325 (Gil. 293); *Daniel v. Mitchell*, 1 Story, 172, Fed. Cas. No. 3562; *Stebbins v. Eddy*, 4 Mason, 414, Fed. Cas. No. 12342; *Smith v. Babcock*, 2 Woodb. and M. 246, Fed. Cas. No. 13009; *White v. Denman*, 1 Ohio St. 110; *Willamas v. Sturdeman*, 27 Ala. 598; *Moehlenpah v. Mayhew*, 123 Wis. 561, 118 N. W. 826, 831.

3. Upon a bill filed for relief on the ground of fraud, relief may be granted on the ground of mistake: *Read's Admrs. v. Cramer*, 3 N. J. Eq. 277, 34 Am. Dec. 204. Likewise, where an an-

swer averred mistake, relief may be given on the ground of fraud: *Berryman v. Graham*, 21 N. J. Eq. 370.

4. Relief administered irrespective of form of action.—Under the form of procedure whereby the distinction between forms of action is abolished, the court may in an action,—in effect, a suit to enforce a rescission which has been offered and refused,—administer equitable relief, regardless of the question whether under a former system of jurisprudence the action would be deemed an action in assumpsit for money paid, or an action in equity to compel rescission and a return of the consideration: *Spreckels v. Gorrill*, 152 Cal. 383, 92 Pac. 1011, 1016, (to recover money alleged to have been paid as the price of corporate stock).

5. Petition, when insufficient.—A petition in an action in equity to rescind an executed contract of exchange of real estate, and to set aside a deed on the ground of fraud, which does not plead sufficient facts to constitute fraud, and from which it is apparent that the plaintiff was not acting equitably in his

offer of rescission, that he was not prompt in demanding a rescission, etc.; held insufficient: *Town of Grand River v. Switzer*, 143 Iowa 9, 121 N. W. 516, 517.

6. A complaint in equity for rescission of a contract can not be supported by averments as to a breach of a condition subsequent, or of an express warranty, or breach of the covenant, in the absence of other grounds of equitable jurisdiction: *Forster v. Flack*, 140 Wis. 48, 121 N. W. 890, 891, citing *Davison v. Davison*, 71 N. H. 180, 51 Atl. 905; *Raley v. Umatilla County*, 15 Ore. 172, 18 Pac. 890, 3 Am. St. Rep. 142; *Love v. Teter*, 24 W. Va. 741.

7. Pleading defense of rescission in the alternative.—A defense of general denial, coupled with the special defense, stating that whatever agreement, if any, the defendant made for the purchase of stock referred to in plaintiff's petition was, by and with the consent of the plaintiff, rescinded; held, not bad for inconsistency between defenses: *Palais Du Costume Company v. Beach* (Mo. App.), 129 S. W. 270, 271.

CHAPTER CXXXII.

Cancelation of Instruments.

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§ 464. CODE PROVISIONS.**When cancelation may be adjudged.**

California, § 3412. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing. Where the provisions differ materially from the above, a further reference is made in a lettered note succeeding and the difference there shown:

Montana, Rev. Codes 1907, § 6115. • North Dakota, Rev. Codes 1905, § 6626. South Dakota, Rev. Codes 1903, C. C. § 2356.

• North Dakota, § 6626. When a written instrument, or the record thereof, may cause injury to a person against whom such instrument is void or voidable, such instrument may, in an action brought by the party injured, be ad-

judged void and the same be ordered to be delivered up for cancelation and the record thereof canceled, whether extrinsic evidence is necessary to show its invalidity or not.

As to instrument obviously void.

California, § 3413. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provisions of the last section. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6116. South Dakota, Rev. Codes 1903, C. C. § 2357.

Cancelation in part.

California, § 3414. Where an instrument is evidence of different rights or obligations, it may be canceled in part, and allowed to stand for the residue. (Kerr's Cyc. Civ. Code.)

The following statutes treat of the same subject as the foregoing:

Montana, Rev. Codes 1907, § 6117. North Dakota, Rev. Codes 1905, § 6627. South Dakota, Rev. Codes 1903, C. C. § 2358.

§ 465. COMPLAINTS [OR PETITIONS].

FORM No. 1079—To annul a contract.

[Title of court and cause.]

Plaintiff complains of defendant, and for cause of action alleges:

1. That on the day of , 19 , plaintiff was the owner

of a tract of land situate in the county of _____, in this state, and particularly described as follows, to wit: [Here describe]; that said land was then, and ever since has been, and now is, of the value of \$ _____.

2. That plaintiff, on the date aforesaid, and for some time prior thereto and thereafter, was infirm in mind [or physically], the nature of his infirmity [or physical deficiency, such as loss of eyesight, etc.] being as follows: [Here allege the facts showing the plaintiff's condition]; that by reason thereof the plaintiff was on said date incapacitated from doing any business or making or entering into any contract whatever [or if the disability be such as to have been fraudulently taken advantage of, allege the facts accordingly]; that on the date aforesaid, the defendant, knowing of the plaintiff's said incapacity and infirmity [or disability], and for the purpose of defrauding the plaintiff, procured and caused plaintiff to execute an instrument in writing in the form of a deed conveying, or purporting to convey, to the defendant said tract of land from the plaintiff; that the defendant falsely represented said instrument to be [here state specific representations, etc., constituting facts of fraud]; that plaintiff, by reason of his condition of mind [or physical condition] aforesaid, believing such representations to be true, and by reason of said representations, and wholly and only on account thereof, executed such instrument in writing, and acknowledged the execution thereof, and delivered the same to defendant; that there was not then, and never was, any consideration given for such deed; that on the _____ day of _____, 19____, defendant caused said instrument in writing to be recorded as a deed in the office of the recorder of said county of _____.

Wherefore, plaintiff prays judgment: That said instrument in writing be delivered up by the defendant; that the same, together with the record thereof, be adjudged to be void; that defendant, or, in the event of his refusal so to do, some competent officer or person appointed by the court herein, convey to plaintiff the legal title acquired by the defendant as hereinbefore alleged; that the court grant such other and further relief as the equity of the case may require; and that plaintiff be given his costs of suit herein incurred.

A. B., Attorney for plaintiff.

[Verification.]

FORM No. 1080—Supplemental complaint in action commenced by special administrators and continued by executors to quiet title and for cancelation of forged deed.

(In *Angus v. Craven*, 132 Cal. 691; 64 Pac. 1091.)

[Title of court and cause.]

Now come the plaintiffs, James S. Angus, Thomas G. Crothers, and W. S. Goodfellow, executors of the last will and testament of James G. Fair, deceased, (substituted for James S. Angus, Thomas G. Crothers, and W. S. Goodfellow, surviving special administrators of the estate of James G. Fair, deceased,) and by leave of court first had and obtained, and by way of supplemental complaint, complain of and against the defendants, Nettie R. Craven, Marc Livingston, George R. Williams, Stephen Roberts, Elizabeth Haskins, John Doe, Richard Roe, Jane Doe, and Mary Roe, and for cause of complaint and action, allege as follows:

[Averment of ownership in decedent.]

1. That on the 28th day of December, 1894, James G. Fair was the lawful owner in fee-simple, and in the actual possession by himself and his tenants, of all those certain premises or parcels of land situated, lying, and being in the city and county of San Francisco, state of California, and bounded and described as follows: [Here follows descriptions of said property.]

[Averments as to decease, appointment of special administrators, etc.]

2. That on said 28th day of December, 1894, and while the said James G. Fair was still the owner in fee-simple of said described premises, the said James G. Fair died testate in the city and county of San Francisco, state of California, leaving said real estate and other property, real and personal, in said city and county, and being a resident of said city and county of San Francisco at and immediately prior to the time of his death.

3. That thereafter, and on the 29th day of December, 1894, the last will and testament of said James G. Fair, deceased, together with a petition for the probate thereof, was filed for probate in this court, and such proceedings were thereafter had in this court in the matter of said estate that on the 2d day of January, 1895, an order was duly given, made, and entered by said court wherein and whereby these plaintiffs, together with one Louis C. Bresse, were appointed special

administrators of the estate of James G. Fair, deceased, with power and authority to collect and take charge of said estate in whatever county or counties the same should be found, to exercise such power as might be necessary in the preservation of said estate, and to preserve all the goods, chattels, notes, and effects of said deceased, all incomes, rents, issues, profits, claims, and demands of said estate, as well as to take the charge and management of, and enter upon and preserve from damage, waste, and injury, the real estate belonging to said estate, and for any such and all necessary purposes to commence and maintain or defend suits and other legal proceedings, as administrators, and to exercise such other powers and to do such other acts and things as should be directed or allowed by the further orders of this court; that thereupon, and on the last-named date, these plaintiffs, together with said Louis C. Bresse, duly qualified as such special administrators, special letters of administration were thereupon issued to them, which have never been modified, revoked, or set aside, and ever since said last-named date, and until the 16th day of November, 1896, said plaintiffs were the duly appointed, qualified, and acting special administrators of the estate of said James G. Fair, deceased, the said Louis C. Bresse having in the meantime, and on the 22d day of April, 1896, died.

[Possession by special administrators, and their succession by executors.]

4. That immediately upon their appointment as such special administrators, these plaintiffs and Louis C. Bresse entered into and upon, and took possession of, all the estate of said deceased, including the real estate hereinbefore particularly described, and thereafter continued in the possession and management of the same until said 22d day of April, 1896, since which last-named date and until the 16th day of November, 1896, these plaintiffs, acting as such surviving special administrators, continued in the actual and peaceable possession of said premises and every part thereof, and during all of said times collected and received all the rents, issues, and profits of said premises, amounting to the sum of \$4,000 per month, or thereabouts; that on the 23d day of June, 1896, this court, by its order duly given and made, authorized these plaintiffs, acting as such special administrators, to commence this action; that on the 16th day of November, 1896, and since the commencement of this action, an order and decree was duly given, made, and entered by said court

in the matter of the estate of said James G. Fair, deceased, wherein and whereby said last will and testament of said James G. Fair, deceased, was duly admitted to probate, and wherein and whereby these plaintiffs were duly appointed the executors of said last will and testament; that thereafter, and on the same day, these plaintiffs duly qualified as such executors, and letters testamentary were duly and regularly issued out of this court to them, and they have ever since been, and still are, the duly appointed, qualified, and acting executors of the last will and testament of said James G. Fair, deceased, and since the said 16th day of November, 1896, these plaintiffs, as executors of the last will and testament of James G. Fair, deceased, have continued in the possession and management of all the estate of said deceased, including the real estate hereinbefore particularly described, and have continued in the actual and peaceable possession of said premises and every part thereof, and during all of said times have collected and received, and are now collecting and receiving, all the rents, issues, and profits of said premises, amounting to the sum of \$4,000 per month, or thereabouts.

[Claims of defendants under forged deed.]

5. That the defendants claim and pretend, and each of them claims and pretends, to have some estate, right, title, or interest in or to the said premises hereinbefore described adverse to these plaintiffs, as such executors of the last will and testament of the said James G. Fair, deceased, and adverse to said estate; that said claim of said defendants is based, as these plaintiffs are informed and believe, and therefore aver, upon certain false, forged, and simulated deeds, purporting to have been executed by said James G. Fair in his lifetime, on the 8th day of September, 1894, and by which said false, forged, and simulated deeds it is claimed by the said defendants the said James G. Fair conveyed the premises hereinbefore described, or a portion thereof, to the defendant Nettie R. Craven, and which false, forged, and simulated deeds were recorded in the county recorder's office in the city and county of San Francisco, state of California, on the 19th day of June, 1896; that the defendants other than defendant Nettie R. Craven have, or claim to have, some interest in said described premises under and in subordination to the claims of the said defendant Nettie R. Craven, and all of said defendants have, or claim to have, some other interest in said described premises

adverse to the said estate of said James G. Fair, deceased, and to these plaintiffs, as such executors, the nature of which claim is unknown to these plaintiffs.

[Injury resulting from defendants' claims.]

6. That the claims and pretensions of said defendants are, and each of them is, false and unfounded either in law or in equity, but these plaintiffs aver that the assertion of the same by the said defendants, and by each of them, tends to cloud the title of the estate of said James G. Fair, deceased, to said described premises, to impair the market value thereof, obstruct these plaintiffs in the management of said premises, as executors of said last will and testament of said James G. Fair, deceased, to harass and annoy them in the possession thereof, and in the collection of the rents, issues, and profits thereof belonging to the estate, to depreciate the market value of said premises, and thereby to inflict irreparable injury upon the said estate, and upon these plaintiffs, as executors of the last will and testament of said James G. Fair, deceased.

7. And these plaintiffs further aver that, unless restrained by the judgment and decree of this honorable court, the assertion of said false and fraudulent claim to said premises by said defendants will continue to harass and annoy these plaintiffs, as such executors, in the possession of said premises, will depreciate the market value of said premises, will obstruct, harass, and annoy these plaintiffs, as such executors, in the collection of the rents, profits, and issues of said described premises, and cloud the title of the estate to said premises.

[As to fictitious parties.]

8. That the real names of the defendants sued herein by the fictitious names of John Doe, Richard Roe, Jane Doe, and Mary Roe are unknown to these plaintiffs, but, when the same are discovered, these plaintiffs pray that said real names may be inserted herein in lieu of said fictitious names.

9. That heretofore, to wit, on the 23d day of February, 1897, and since the commencement of this action, by the order of this court duly given and made herein, the plaintiffs, as executors of the last will and testament of James G. Fair, deceased, were substituted for themselves as surviving special administrators of said estate.

[Prayer for cancelation, injunction, etc.]

Wherefore, these plaintiffs as such executors, pray the judgment and decree of this court: That said defendants, and each of them, be summoned to answer to the premises; that they, and each of them, set forth what claim they have or pretend to have to said described premises, or to any part or portion thereof; that the said deeds and the said certificates of acknowledgment and the aforesaid records of the aforesaid respective deeds be adjudged to be null and void, and that the same be canceled and removed as a cloud upon the title to said real property; that the said defendants be compelled to surrender up the aforesaid pretended deeds and certificates of acknowledgment for cancelation, and that the same be canceled under the direction of the court; that the said estate of said James G. Fair, deceased, may be decreed to be the lawful owner in fee-simple of said described premises, and every part and parcel thereof, as against the said defendants and each of them; that defendants have not, nor has either of them, any right, title, interest, claim, or demand of any nature or description against said described premises or any portion thereof; that these plaintiffs, as executors of the last will and testament of said James G. Fair, deceased, are lawfully in possession of said described premises, and every part and parcel thereof, and lawfully entitled to collect the rents, issues, and profits thereof, as such executors, and that the defendants, and each of them, and all persons claiming under them, be forever enjoined and restrained from asserting or pretending to have any estate, right, title, or interest in said described premises, or any part or portion thereof, and from interfering with the possession thereof; and for such other and further relief, or both, in the premises as may be just and agreeable to equity.

Pierson & Mitchell,
Garret W. McEnerney,
Attorneys for plaintiffs.

[Verification.]

§ 466. ANSWER.

FORM No. 1081—Defense that instrument was executed under undue influence.—Action to cancel deed.

(In *Hemenway v. Abbott*, 8 Cal. App. 450; 97 Pac. 190.)

[Title of court and cause.]

The defendant, for answer to the plaintiffs' complaint, denies and alleges as follows:

1-10. [The answer here specifically denies the allegations in the complaint, either directly or upon information and belief, as to plaintiffs being heirs at law of the decedent grantor to defendant; as to the infirmities of said decedent, his mental weaknesses, etc.; as to the alleged influence exercised upon decedent's mind and will in procuring a deed to his property; as to the consideration named in the deed being fictitious, and that the same was afterwards returned by decedent to defendant; as to any trust or trusts created thereby; as to exercise of undue influence, fraud, importunities, or duress; as to title in defendant being a mere naked legal title, "but on the contrary the defendant alleges that the defendant has a good title, legal and equitable, to said lands and premises, and every part thereof"; as to title of defendant being illegal or void.]

11. That the said deed was made, executed, and delivered by said George W. Proctor, since deceased, on the 5th day of May, 1904, without any undue or any influence whatever being exercised by this defendant upon said George W. Proctor, and was made, executed, and delivered for the purpose of conveying to this defendant all of the property therein described in fee-simple absolute.

Wherefore, defendant prays judgment: That the plaintiff take nothing by this action; that the adverse claims of the plaintiff to the said real property described in the complaint be determined by the judgment of this court, and that by said judgment it be decreed that the said deed made by said George W. Proctor to the defendant is good and valid; that the plaintiff has no estate or interest whatever in or to the lands or premises described in said complaint, either as administratrix with the will annexed of the estate of said George W. Proctor, deceased, or otherwise, and that the title of the defendant thereto is good and valid, and that the plaintiff be forever enjoined and restrained from asserting any claim whatever in and to the said lands and premises adverse to the defendant; that the

defendant have such other and further relief as may be proper in the premises, and recover her costs herein.

Charles G. Lamberson, and

Frank Lamberson,

Attorneys for defendant.

[Verification.]

§ 467. JUDGMENTS [OR DECREES].

FORM No. 1082—Confirming deed, and quieting defendant's title thereunder.

—Action to cancel deed alleged to have been executed under undue influence.

(In *Hemenway v. Abbott*, 8 Cal. App. 450; 97 Pac. 190.)

[Title of court and cause.]

This cause came on regularly for trial, before the court, without a jury, on the 18th day of September, 1906. Messrs. Lippitt & Lippitt appeared as attorneys for the plaintiff, and Charles G. Lamberson appeared as attorney for the defendant; and the court having heard the testimony, and having examined the proofs offered by the respective parties, the cause having been argued by briefs submitted by the respective parties, and the court being fully advised in the premises, and having filed herein its findings of fact and conclusions of law, and having directed that judgment be entered in accordance therewith; now, therefore, by reason of the law and findings aforesaid:

It is hereby ordered, adjudged, and decreed: That the plaintiff take nothing by this action; that the deed made by George W. Proctor to defendant, set out in the complaint herein, is good and valid; that the plaintiff has no estate or interest whatever in or to the lands and premises described in the complaint herein, to wit: [Here follows description of said property], either as administratrix with the will annexed of the estate of said George W. Proctor, deceased, or otherwise, and that the title thereto is good and valid; that the plaintiff be and she is forever enjoined and restrained from asserting any claim whatever in or to the said lands and premises adverse to the defendant; that the defendant have judgment against the plaintiff for her costs herein expended, hereby taxed at the sum of \$.

Dated, December 13, 1906.

M. L. Short,
Judge of Superior Court.

FORM No. 1083—Annulling deed, and quieting plaintiff's title as against the same.—Action for cancelation of forged deed.

(In *Angus v. Craven*, 132 Cal. 691; 64 Pac. 1091.)

[Title of court and cause.]

This cause having been regularly called and tried before the court sitting as a court of equity upon the equitable issues raised herein by the answer of the plaintiffs filed March 8, 1897, the cross-complaint of the defendant Nettie R. Craven, filed February 26, 1897, and upon the equitable issues joined herein between the intervener, Virginia Fair, and the defendant in said intervention, Nettie R. Craven; the defendants George R. Williams, Stephen Roberts, and Elizabeth Haskins having filed herein their written disclaimer, disclaiming any interest of any nature or description in or to the premises described in the complaint herein, or any part thereof; default of the defendant Marc Livingston having been duly entered of record for failure to appear or answer to the complaint of the plaintiffs herein, and the default of the defendants Elizabeth Haskins, Stephen Roberts, George R. Williams, and Marc Livingston, for failure to answer to the complaint in intervention having been duly entered of record, and the action having been dismissed as to the defendants sued under the fictitious names of John Doe, Richard Roe, Jane Doe, and Mary Roe, and the court having made and rendered its decision, and the findings of fact and conclusions of law having been filed herein, whereupon the plaintiffs and the intervener were awarded a decree that the deeds and the certificates of acknowledgment attached thereto, referred to in said findings, and the records thereof, are null and void, and removing the same as a cloud upon title, and that the said defendant Nettie R. Craven has no right, title, interest, claim, or demand of any nature against the premises described in said findings, or any portion thereof, and that the said defendant Nettie R. Craven is, and all persons claiming through or under her are, forever debarred, restrained, and enjoined from asserting or pretending that the alleged deeds are, or either of them is, valid or genuine, and from claiming or asserting any right or title to the said premises, or any part thereof, under said deeds, or either of them, and further awarding to the plaintiffs and intervener a judgment for their costs.

It is now further hereby ordered, adjudged, and decreed, that the said deeds and the said certificates of acknowledgment referred

to in the pleadings herein and in said findings, and the records thereof, are, and each of them is, null and void, and that the same be and they are hereby removed as a cloud upon the title to the property described in said findings; that the defendant Nettie R. Craven has no right, title, or interest in, nor any claim or demand of any nature or description against, the said described premises or any part thereof, and that all persons claiming through or under her be and they hereby are forever debarred, restrained, and enjoined from asserting or pretending that said alleged deeds are, or either of them is, valid or genuine, or from claiming or asserting any right or title to the said premises, or any part thereof, under the said deeds, or either of them.

Said premises are bounded and described as follows, lying and being in the city and county of San Francisco: [Here follows description of said property as the same appears in the complaint.]

And it is hereby further ordered, adjudged, and decreed, that the plaintiffs and intervener do have and recover their costs herein, taxed at \$3,849.50, against the defendant Nettie R. Craven.

Dated December 1, 1897.

Charles W. Slack, Judge.

§ 467. ANNOTATIONS.

Cancelation distinguished from reformation.—Pleading.—A distinction must be observed between suits for reformation and suits for cancelation and rescission of a contract. In the former suits there must be shown not a mere mistake on one side, but a mutual mistake, or what is equivalent in the law to a mutual mistake, and, in addition, an enforceable contract of the tenor and terms sought to be established by the suit for reformation. On the other hand, cancelation or rescission proceeds upon the ground that there is no contract between the parties by reason of the mistake or fraud. Relief on evidence showing mistake may be had under a bill, the gravamen of which is fraudulent representation and undue influence, although the bill does not denominate the transaction as being one produced by mistake: *Moehlenpah v. Mayhew*, 138 Wis. 561, 119 N. W. 826, 830; *Kyle v. Fehley*, 81 Wis. 67, 51 N. W. 257, 29 Am. St. Rep. 866.

Parties.—In an action to cancel a deed of trust, beneficiaries are not necessary parties defendant, since their interest is fully represented by the trustee: *Watkins v. Bryant*, 91 Cal. 492, 27 Pac. 775.

TITLE XVII.

Miscellaneous Civil Proceedings.

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CHAPTER CXXXIII.

Summons and Citation.—Jurisdiction.

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§ 469. SUMMONS.

FORM No. 1084—Judgment demanded. (California.)

[Title of court and cause.]

The people of the state of California send greeting to ,
defendant:

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the superior court of the state of California, in and for the county of , within days after the service on you of this summons, if served within this county, or within thirty days, if served elsewhere.

And you are hereby notified that unless you so appear and answer as above required, the plaintiff will take judgment for the sum of \$ as demanded in the said complaint, as arising upon contract, and for costs.

Given under my hand and the seal of the superior court of the state of California, in and for the county of , this day of , 19 .

[Seal.]

C. D., Clerk.

By E. F., Deputy Clerk.

[Endorsed with name of the attorney for the plaintiff, and, if served and returned, with certificate as in form No. 1086, or affidavit as in form No. 1139, and date of filing.]

FORM No. 1085—Alternative relief. (California.)

[Title of court and cause.]

[As in preceding form, except in the place of the paragraph starred thus (* *) insert the following paragraph:]

* And you are hereby notified that unless you so appear and answer as above required, the plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract, or will apply to the court for any other relief demanded in the complaint [etc.].*

Statutory provisions as to process.—Each of the code states prescribes either the form or the substance of the summons and all processes upon which jurisdiction is founded. Space will not permit the correlation of these statutes, but it may be generally said that the above forms of summons are representative of the forms prescribed in most of the states covered by this work. In all instances, however, the statutory forms, where prescribed, should be used, and the statutory provisions carefully observed. Under the procedure in some states, the summons is issued upon a praecipe, or request in writing directed to the clerk for the issuance thereof. The Iowa code (§ 3514) provides that the plaintiff may give a notice to the defendant before complaint (or petition) is filed, to the following effect: "That on or before a certain day [naming it] a petition will be filed in the office of the clerk of the district court of the state of Iowa, in and for the county of _____, claiming of you the sum of \$ _____, as justly due the plaintiff on [here stating the nature of the obligation], and that unless you appear thereto and defend before noon of the second day of the term [naming it] of said court, which will commence on the _____ day of _____, 19 _____, at the courthouse in the county of _____, state of Iowa, default will be entered against you and judgment [or decree] rendered thereon.

"[Signature of the plaintiff or his attorney.]"

§ 470. CERTIFICATES, ORDERS, ETC.

FORM No. 1086—Sheriff's certificate of service of summons. (Endorsed or original summons.)

Sheriff's office, } ss.
County of . }

I hereby certify, that I received the within summons on the day of _____, 19____, and personally served the same on the _____ day of _____, 19____, on _____, being the defendant named in said summons, by delivering to him, the said defendant, personally, in the county of _____, a copy of said summons, and a copy of the complaint in the action therein mentioned, which was attached thereto, and by then and there exhibiting to defendant the within original summons in said action.

[Date.]

M. N., Sheriff.

O. P., Deputy Sheriff.

Sheriff's fee, \$.

FORM No. 1087—Notice of motion to quash summons or its service.

[Title of court and cause.]

To _____, attorney for plaintiff:

Please take notice, that defendant, appearing for this and no other purpose, will move the court at the courtroom [department No.] thereof, on the day of , 19 , at o'clock M., or as soon thereafter as counsel can be heard, to quash the summons in this action [or to set aside the alleged service of the summons in this action], and for an order quashing [or setting aside] said alleged

service, on the ground that said summons is defective [or on the ground that the service of the summons was not properly made]. Said motion will be based on the summons in the action [or on the summons and the evidence of the alleged service thereof, endorsed on, or attached to, said summons, and (if used) on affidavits, copies of which are attached to this notice and served herewith].

[Date.]

A. B., Attorney for defendant, for the purpose of said motion only.

FORM No. 1088—Order extending time to answer after decision on motion to quash.

(In *Anderson v. Schloesser*, 153 Cal. 219; 94 Pac. 885.)

[Title of court and cause.]

The above-named defendant having made a special appearance in the above-entitled action for the purpose of moving the court to quash summons, it is ordered that he be and he is hereby granted ten days' time after decision on said motion within which to serve and file his demurrer or answer in said action.

Dated March 9, 1905.

F. A. Kelley,
Judge of Superior Court.

FORM No. 1089—Affidavit as basis of order for service by publication.¹

(In *Bantley v. Finney*, 43 Neb. 794; 62 N. W. 213.)

[Title of court and cause.]

State of Nebraska, }
Lancaster County. } ss.

J. R. Webster, being first duly sworn, on his oath says: I am the attorney of record of Richard C. McWilliams, plaintiff in the above-entitled cause. On the 19th day of July, 1882, said plaintiff filed a petition in the district court of Lancaster County against Gotlieb Bantley, the object and prayer of which is to enforce a specific performance of a written contract for the sale of certain premises described as the southeast quarter of section 24, township 10 north, of range 7 east, of sixth principal meridian, made and entered into

¹ The affidavit in form No. 1089 is held to contain all the averments of fact necessary to authorize the plaintiff to make service upon the defendant by publication, and give the court jurisdiction of the defendant, if such service by publication should be made as provided by sections 79 and 80 of the Nebraska Code of Civil Procedure: *Bantley v. Finney*, 43 Neb. 794, 62 N. W. 213, 214.

by and between the said defendant, as vendor, by J. P. Walton, his agent duly authorized in writing, and said plaintiff, as vendee, on or about the 15th day of June, 1882, for sale of said premises, at the price of \$2,400, exclusive of agent's commission, \$800 payable in hand, \$533 1/3 on or before two years, and two like sums on or before three and four years, respectively, with interest at the rate of seven per cent per annum, to be secured by mortgage on said premises; that said plaintiff is absent from the county of Lancaster, and affiant makes this affidavit in his behalf for that reason; that said defendant is a non-resident, and resides at Johnstown, in the state of Pennsylvania, and is absent from the state of Nebraska, and service of summons can not be made within the state on him; wherefore the plaintiff prays for service by publication.

J. R. Webster.

[Jurat.]

§ 471. CITATIONS, ORDERS, ETC.

FORM No. 1090—Citation. (Common form.)

[Title of court and cause.]

The people of the state of _____ to _____, greeting:

By order of this court, you are hereby cited and required to appear before this _____ court, at the courtroom of department No. _____ thereof, at _____, in said county of _____, on _____, the _____ day of _____, 19____, at _____ o'clock in the _____ noon of the day, then and there to [here state nature of matter concerning which appearance is required or testimony to be given].

Witness the Hon. _____, of our _____ court
in and for the said county of _____, with the
seal of said court affixed, this _____ day of
_____, 19____.

Attest:

C. D., County Clerk.

[Seal.]

By E. F., Deputy Clerk.

FORM No. 1091—Order for citation to executor upon application by creditor.

[Title of court and cause.]

M. N., being a creditor of, and the person interested in, the estate of L. M., deceased, having this day presented to this court, and filed herein, his petition praying that X. Y., as executor of the last will of L. M., deceased, be required by the court to appear and render, for

the information of this court, an exhibit under oath showing the debts and liabilities of the estate of said L. M., deceased, and the assets and property belonging to said estate, and the condition thereof, and of the matters and things necessary or proper for the purpose of showing the condition of the affairs of said estate; and this court, being satisfied that the facts alleged in said petition are true, and considering and deeming the showing made by said applicant and petitioner sufficient to justify this court in granting the prayer of said petition:

It is now hereby ordered and directed, that a citation be forthwith issued requiring and directing the said X. Y., as executor of the last will of L. M., deceased, to appear in this court in the courtroom of department thereof, at , on , 19 , then and there to render to this court, and on that day to file herein, an exhibit and statement under oath, showing and setting forth the following matters and things to wit: [Here state as to facts and reports to be presented.]

It is further hereby ordered, that a copy of this order, and of the citation aforesaid, be served upon said executor at least days before the date of said hearing.

[Date.]

S. T., Judge.

FORM No. 1092—Acknowledgment of service of citation. (Annexed to citation.)

[Title of court and cause.]

Service of a copy of the within citation, and also of a copy of the order to show cause, pursuant to which said citation was issued, and of a copy of the petition mentioned in said citation, is hereby admitted this 29th day of June, 1899. [Signature of executor.]

FORM No. 1093—Citation to executor and surviving widow to show cause why family allowance should not be reduced.

[Title of court and cause.]

The people of the state of to X. Y., as executor of the last will of L. M., deceased, and to T. M., widow and surviving wife of said L. M., deceased, greeting:

You are hereby cited to be and appear in our court of the county of , at the courtroom thereof, department , at , in the city of , county of , on , the

day of , 19 , at o'clock M. of that day, then and there to answer the petition of R. M., as trustee [or heir at law and devisee, etc.] under the last will of L. M., deceased, praying for a modification of the order herein made on the day of , 19 , fixing a family allowance of \$, to said T. M., and that the allowance heretofore made and directed to be paid out of the estate of said L. M., deceased, be, by order, modified and reduced in the following respect: [Here state.] A copy of said petition is herewith served upon you. And you are required to then and there show cause, if any you have, why the prayer of said petition should not be granted.

By order of our court, in the county of , this day of , 19 .

[Seal.]

W. D., Clerk.

By M. N., Deputy Clerk.

FORM No. 1094—Order sustaining demurrer to petition and discharging citation.

[Title of court and cause.]

The petition of M. N., a creditor, for a citation against T. M., widow of said L. M., deceased, to show cause why the family allowance under orders heretofore made should not be reduced, having been filed herein on the day of , 19 , and citation having been duly issued thereon and served on T. M., and she having made and filed herein her return or answer to said citation, and part of said answer being the demurrer to the said petition of said M. N., and the matter coming on regularly for hearing this day of , 19 , and the demurrer of said T. M. to said petition having been argued by counsel for the respective parties, was submitted to the court for decision; and the court being fully advised in the premises:

It is hereby ordered, that the said demurrer to said petition be and the same is hereby sustained, and the said T. M., is hereby discharged from said citation and said citation is hereby dismissed.

[Date.]

S. T., Judge.

Form of return endorsed on a summons in an action to recover balance due for manufacturing, furnishing, and erecting certain machinery for the reduction of ores: *Colorado Iron-Works v. Sierra Grande Min. Co.*, 15 Colo. 499, 504, 25 Pac. 325, 22 Am. St. Rep. 433.

§ 472. ANNOTATIONS.—Summons and citation.—Jurisdiction.

1. General jurisdiction of state courts coextensive with its sovereignty.
2. Essentials of jurisdiction.
3. Consent as conferring jurisdiction.
- 4, 5. Consenting or agreeing to a continuance.
6. Answer praying for affirmative relief.
7. Jurisdiction to render personal judgment.
8. Non-resident debtors.
9. Local actions.
10. Transitory actions.
- 11, 12. Government as party.—Jurisdiction of state courts.
13. Entry of judgment terminates jurisdiction.
- 14, 15. Publication of notice.
16. Purpose of affidavit for service by publication.
17. Defective service waived by answering over.
18. Time to answer pending motion to quash service.
19. Signification of word "process."
20. Process under Kansas statute.

1. General jurisdiction of the courts of a state is coextensive with its sovereignty, and attaches to all the property and persons within the limits thereof: *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 1101.

2. Essentials of jurisdiction.—Jurisdiction may be defined as the right to adjudicate the subject-matter in a given case. To constitute this there are three essentials: First, the court must have cognizance of the class of cases to which the one to be adjudged belongs; second, the proper parties must be before the court; and third, the point decided must be in substance and effect within the issues: *Robinson v. Levy*, 217 Mo. 498, 117 S. W. 577, 582, quoting from and approving *Munday v. Vail*, 34 N. J. L. 422.

3. Consent as conferring jurisdiction.—Consent can not confer jurisdiction of the subject-matter, but it may confer jurisdiction of the person: *Maxwell v. Frazier*, 52 Ore. 183, 96 Pac. 548, 550, 18 L. R. A. (N. S.) 102, quoting the rule stated in 12 Pl. & Pr. 126.

4. Consenting or agreeing to a continuance of a cause from one term to another operates as a waiver to the same effect, and confers complete jurisdiction: *Balsley v. Balsley*, 113 Mo. 544, 21 S. W. 29, 35 Am. St. Rep. 726; *Peters v. St. Louis etc. R. Co.*, 59 Mo. 406; *Seay v. Sanders*, 88 Mo. App. 478.

5. Agreeing to reset a cause is likewise a waiver, and confers jurisdiction: *Columbia Brewery Co. v. Forgey*, 140 Mo. App. 605, 120 S. W. 625, 628.

6. Answer praying for affirmative relief.—The defendant waives his right to object to the jurisdiction of the court when he has answered without objection to the jurisdiction, and has claimed affirmative relief: *Kitcherside v. Myers*, 10 Ore. 21; *Municipal Security Co. v. Baker Co.*, 33 Ore. 338, 54 Pac. 174; *O'Hara v. Parker*, 27 Ore. 156, 39 Pac. 1004; *Killgore v. Carmichael*, 42 Ore. 618, 72 Pac. 637.

7. Jurisdiction to render personal judgment.—A personal judgment in an action in personam can only be had after personal service of the defendant or his voluntary appearance in the action. Constructive service, such as service by publication, is ineffectual for this purpose: *Silver Camp Min. Co. v. Dickert*, 31 Mont. 488, 78 Pac. 967, 67 L. R. A. 940, 3 Am. & Eng. Ann. Cas. 1000.

8. Non-resident debtors. — Statutory requirements for obtaining jurisdiction of non-resident debtors, and for attachment of property within the territorial jurisdiction of the court, which requirements are in derogation of the common-law mode of personal service, must be strictly complied with. Unless this is done in the case of such non-resident debtors who do not appear, the court acquires no jurisdiction for any purpose whatever as against them or their property. Even in proceedings in rem against the property of non-resident debtors the requirements as to publication or citation as expressly provided by law must be observed, whereby they may have their day in court; otherwise, the court will acquire no jurisdiction

or authority to adjudge a sale of their property to satisfy their debts: *Smith v. Montoya*, 3 N. Mex. 40, 1 Pac. 175.

9. Local actions, such, for example, as those relating to interests in lands, are usually laid in the district or the county where the subject-matter lies; but transitory actions may be tried wherever personal service can be made on the defendant: *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 1101, construing Mont. Rev. Codes, § 6504.

10. Transitory actions.—Actions for injuries to the person are transitory, and follow the person; and therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in the courts of a state for a tort committed in another country, the same as on a contract made in another country: *Dewitt v. Buchanan*, 54 Barb. 31, cited in *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 1102.

11. Government as party.—Jurisdiction of state courts.—Where the government invokes the jurisdiction of a court, it submits to that jurisdiction; presenting a claim for its adjudication, it asks that the claim be adjudicated upon its merits, and allowed or rejected accordingly. If it sues, it is subject to the defense of offset upon the amount of whatever claim it shall establish,—a defense which does not controvert the claim, but is in the nature of a limited or quasi cross-suit against it, allowed, not beyond the extent of the affirmative remedy, but only to the extent of defeating that claim: *United States v. McDaniels*, 7 Pet. 1, 8 L. ed. 587; *United States v. Ripley*, 7 Pet. 18, 8 L. ed. 593; *United States v. Robeson*, 9 Pet. 319, 9 L. ed. 142, cited in *Union Pacific R. Co. v. United States*, 2 Wyo. 170, 191, where the proposition above stated as to jurisdiction, and the effect of submission of a controversy thereto, is approved, and application made of a territorial statute to the measure of relief where judgment goes against the government.

12. The superior court has jurisdiction of an action brought to recover a statutory penalty by one who alleges title in himself and puts in issue by a verified answer the plaintiff's title, although the amount involved is less than \$300 (this amount being the limit of

jurisdiction in the justice courts under the California statute, where the title to real property is not drawn in question): *Randolph v. Kraemer*, 106 Cal. 199, 201, 39 Pac. 533.

For a specific averment in defense of a demand as a basis for certifying the case to a court of higher jurisdiction, see form No. 382, paragraph 3.

13. Entry of judgment terminates jurisdiction of the court in general: *Los Angeles v. Lankershim*, 100 Cal. 525, 35 Pac. 153, 556; *Ayres v. Burr*, 132 Cal. 125, 64 Pac. 120.

14. Publication of notice.—It is settled in the state of California that where the statute requires that a notice be published for a designated number of weeks in some newspaper published in the county, the same is fully satisfied by a publication once each week for the designated number of weeks in a daily newspaper published in the county: *Sherwood v. Wallin*, 154 Cal. 735, 739, 99 Pac. 191, citing *People v. Reclamation Dist.*, 121 Cal. 522, 524, 50 Pac. 1068, 53 Pac. 1085; *Chapman v. Soberlein*, 152 Cal. 216, 92 Pac. 188, 190.

15. A publication for fourteen consecutive days constitutes a publication of "at least two weeks," where the requisite period of two weeks had fully elapsed prior to the date noticed in the publication for the meeting: *Derby v. Modesto*, 104 Cal. 515, 38 Pac. 900. See *State v. Yellow Jacket etc. M. Co.*, 5 Nev. 415.

16. Purpose of affidavit for service by publication.—An affidavit for service by publication is not designed to convey any information to the defendant to be served. Its purpose is to bring upon the record the statutory foundation for the publication of a notice. When the affidavit discloses that the action is one to foreclose a real estate mortgage and to sell land under such mortgage, a sufficient basis for publication is established: *Sharp v. McColm*, 79 Kan. 772, 101 Pac. 659, 660, citing *Gillespie v. Thomas*, 23 Kan. 138, and Kan. Code Civ. Proc., §§ 72, 74, (Gen. Stats. 1901, §§ 4506, 4508).

17. Defective service waived by answering over.—If the defendant desires to stand upon insufficient service of a writ or summons, its remedy is to move specially to quash the same, and, if the motion be overruled, then to withdraw from further appearance; the defective

service is waived by a general answer to the jurisdiction over the defendant: *Eddy v. Lafayette*, 49 Fed. 809, 1 C. C. A. 441; *Ogdensburgh R. Co. v. Vermont R. Co.*, 63 N. Y. 176; *Handy v. Insurance Co.*, 37 Ohio St. 370, 371; *Gilbert v. Hall*, 115 Ind. 549, 18 N. E. 28; *Kronski v. Railroad Co.*, 77 Mo. 362; *Thomasson v. Mercantile etc. Ins. Co.*, 217 Mo. 485, 116 S. W. 1092, 1095.

18. Time to answer pending motion to quash service.—Time to answer is not extended by and during the pendency of a motion to quash service of summons: *Garvie v. Greene*, 9 S. Dak. 608, 70 N. W. 847.

19. The word "process" signifies a writ or summons issued in the course of judicial proceedings. Under this signification a notice of appeal has been held to be not process: *Gooler v. Eld-*

ness (N. Dak.), 121 N. W. 83, 85, citing and construing N. Dak. Rev. Codes 1905, § 6738.

20. Process under Kansas statute.—Under the Kansas statute, it is provided that the style of process shall be: "The state of Kansas"; that the same shall be under the seal of the court from whence it issues; that it shall be signed by the clerk and dated the day it is issued. It is held, however, that a notice employed by the attorney in obtaining service by publication is not a process within the meaning of the constitution or statute, and need not bear the style of "state of Kansas," nor the seal of the court in which the action is pending, nor be signed or issued by the clerk of such court: *McKenna v. Cooper*, 79 Kan. 847, 101 Pac. 662, 663.

CHAPTER CXXXIV.

Change of Place of Trial or Venue, Generally.—Removal of Causes to Federal Courts.

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§ 473. PROCEDURE FOR CHANGE OF VENUE IN STATE COURTS.**FORM No. 1095—Notice of motion for change of place of trial.**

(In *Younger v. Spreckels*, 12 Cal. App. 175; 106 Pac. 895.)

[Title of court and cause.]

To Jeannie H. Younger, as executrix of the last will and testament of Charles B. Younger, deceased, plaintiff in the above-entitled action, and to Charles B. Younger, Esq., attorney for plaintiff:

You will please take notice, that the defendant, Claus Spreckels, will move the above-entitled court at the courtroom thereof in the county courthouse of the county of Santa Cruz, state of California, on the 15th day of June, 1908, at the hour of ten o'clock A. M. of said day, or as soon thereafter as counsel can be heard, for an order changing the place of trial of the above-entitled action to the city and county of San Francisco, state of California, to be tried in the superior court of the state of California in and for said city and county.

Said motion will be made upon affidavits, which are herewith served upon you, and upon the demand for change of place of trial served herewith, and upon the papers and files in the cause, and this notice, upon the following grounds:

That the defendant is a non-resident of the county of Santa Cruz, state of California, and that the defendant has demanded that the place of trial of said action be changed to the city and county of San Francisco, state of California, the place of residence of said defendant.

Dated June 4, 1906.

Charles S. Wheeler,
Attorney for defendant.

[Acknowledgment of service of the foregoing notice, and filing endorsement.]

Receipt of a copy of the within notice this 5th day of June, 1908, is hereby admitted.

Charles B. Younger,
Attorney for plaintiff.

[Endorsed:] Filed June 5, 1908.

H. H. Miller, Clerk.
By Harry E. Miller,
Deputy Clerk.

FORM No. 1096—Motion for change of place of trial.

(In *Younger v. Spreckels*, 12 Cal. App. 175; 106 Pac. 895.)

Now comes the defendant in the above-entitled action, and moves the court that an order be made changing the place of trial of the above-entitled action from the county of Santa Cruz, state of California, to the city and county of San Francisco, state of California, for the following reasons, and upon the following grounds, to wit:

That defendant, Claus Spreckels, does not reside in the county of Santa Cruz, state of California, and at the time of the commencement of this action was, and ever since has been, and now is, a resident of the city and county of San Francisco, state of California;

That said defendant has filed herein with this motion an affidavit of merits, and has demanded that this action be transferred for trial to the city and county of San Francisco, state of California, and also has filed herein an affidavit showing the residence of said defendant as above set forth, and has served upon the opposing counsel notice of this motion, which said notice sets forth that this motion will be called for hearing on the 15th day of June, 1908, at the hour of ten o'clock A. M. of said day.

Dated June 4, 1908.

Charles S. Wheeler,
Attorney for defendant.

[Acknowledgment of service by attorney for plaintiff and endorsement of filing.]

FORM No. 1097—Demand for change of place of trial.

(In *Younger v. Spreckels*, 12 Cal. App. 175; 106 Pac. 895.)

[Title of court and cause.]

To the superior court of the state of California, in and for the county of Santa Cruz, and to Charles B. Younger, attorney for plaintiff:

I hereby demand that the place of trial of this case be changed to the proper county, viz. the city and county of San Francisco, state of California.

Dated June 1, 1908.

Claus Spreckels,
Residing at the city and county of
San Francisco, state of California.

Charles S. Wheeler, Attorney for defendant.

[Acknowledgment of service by attorney for the plaintiff and endorsement of filing.]

FORM No. 1098—Affidavit of residence.

(In *Younger v. Spreckels*, 12 Cal. App. 175; 106 Pac. 895.)

[Title of court and cause.]

[Venue.]

Claus Spreckels, being first duly sworn, deposes and says:

I am the defendant named in the above-entitled action; that at the time of the commencement of the above-entitled action I resided in the city and county of San Francisco, state of California, and ever since said time have resided, and do now reside, in the said city and county of San Francisco, state of California.

I am not a resident of, and never have resided in, the county of Santa Cruz, state of California.

Claus Spreckels.

[Jurat of notary.]

[Acknowledgment of service by attorney for the plaintiff and endorsement of filing.]

FORM No. 1099—Affidavit of merits.

(In *Younger v. Spreckels*, 12 Cal. App. 175; 106 Pac. 895.)

[Title of court and cause.]

[Venue.]

Claus Spreckels, being first duly sworn, deposes and says: That he is the defendant named in the above-entitled action; that he has fully and fairly stated all the facts of the above-entitled action to his counsel, Charles S. Wheeler, who is an attorney at law admitted to practise, and in good standing, before all the courts of this state; that he is advised by his said counsel, and verily believes, that he has a good and sufficient defense to said action on the merits.

Claus Spreckels.

[Jurat of notary.]

[Acknowledgment of service by attorney for the plaintiff and endorsement of filing.]

FORM No. 1100—Affidavit of residence and of merits for change of place of trial.

[Title of court and cause.]

[Venue.]

, being duly sworn, says: That he is the defendant in this action; that he was at the commencement of this action [and now is] a resident of the county of , in the state of ,

and not a resident of the county in which this action was commenced; that he has fully and fairly stated the case to his counsel, who resides at _____, in the state of _____, and that he was thereupon and is advised by his said counsel, and verily believes, that he has a good and substantial defense on the merits to the action, and that for the reason said _____ County is the proper county for the trial of said action, he makes his demand herein for a change of the place of the trial of said action to said _____ County. [Signature.]

[Jurat.]

FORM No. 1101—Petition for change of venue.¹

(In *St. Louis etc. R. Co. v. McNamare*, 91 Ark. 515; 122 S. W. 102.)

[Title of court and cause.]

[Omitting formal parts, the defendant, petitioner, states:]

That it verily believes that it can not obtain a fair and impartial trial in this, Marion County, on account of the undue prejudice against the petitioner in said county. It further says the plaintiff is not a resident of Marion County, Arkansas, but is a resident of the state of Missouri; that said cause of action, if any she has, and the occurrence of which she complains, did not take place in Marion County, Arkansas, but occurred in the state of Missouri, and plaintiff was not compelled to institute her suit in Marion County in order to get service on the defendant [etc.].

[Ending with prayer to grant an order changing the venue of the case to some other county in the state of Arkansas, and for all other proper relief.]

E. B. Kinsworthy,

S. B. Campbell,

T. T. Dickinson,

[Verification.]

Attorneys for defendant.

¹ A petition for change of venue under the Arkansas statute is required to be signed by the party and verified as pleadings are required to be verified, and shall be supported by affidavits of at least two credible persons to the effect that affiants believe that the statements of the petitioner are true: Kirby's Dig. Ark., § 7304, construed in *St. Louis etc. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102, 104.

§ 474. REMOVAL OF CAUSE FROM STATE TO FEDERAL COURT.

FORM No. 1102—Petition for removal of cause from state to federal court on the ground of diversity of citizenship.¹

[Title of action in state court.]

To the _____ court of the state of _____, in and for the county of _____ :

The petition of _____, the defendant in the above-entitled action, respectfully shows to the court:

1. That your petitioner is a defendant in the above-entitled action, and is actually interested in the controversy herein.

2. That said action has been commenced against him in said court by plaintiff and that said action is of a civil nature.

3. That the matter in dispute in this action exceeds, exclusive of interest and costs, the sum [or value] of \$2,000.

4. That the controversy in this action, and every issue of fact or law therein, is wholly between citizens of different states, and can be fully determined as between them; that the plaintiff, _____, is now, and was at the time of the filing of the complaint in this action, a citizen of and a resident of the state of _____, and the defendant, _____, is now, and was at the time of the commencement of this action, a citizen of and resident of the state of _____.

5. That the time of your petitioner as defendant in this action to answer or plead to the complaint in said action has not yet expired, and will not expire until the _____ day of _____, 19____, and your petitioner has not yet filed any answer thereto or in any way appeared in said action.

6. Your petitioner herewith presents a good and sufficient bond as provided by the statute in such cases that he will on or before the first day of the next ensuing session of the United States circuit court for the _____ district of _____, enter and file therein a copy and transcript of the record of this action and for the payment of all costs which may be awarded by the said court, if the said circuit court shall hold that this suit was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays: That this court proceed no further herein, except to make an order for removal as required by law, and to accept the bonds presented herewith, and to direct a

¹ Under 25 U. S. Rev. Stats. 484, 485.

transcript of the record herein to be made for said court as provided by law and as in duty bound; and your petitioner will ever pray.

[Signature of petitioner.]

[Verification as for a pleading.]

FORM No. 1103—Petition for removal where the action is brought by a citizen against an alien.

[In place of paragraph 4 in form No. 1102, insert the following:]

That at the time said suit was begun, and at the present time, the plaintiff is a citizen and resident of the state of _____, and the defendant was and is an alien, and subject of [naming the foreign kingdom or state], and said defendant is now a resident in the county of _____, and state of _____.

[Etc.]

FORM No. 1104—Petition for removal where a federal question is involved.

[Insert in place of paragraph 4 in form No. 1102, the following:]

That the controversy herein arises under the constitution and laws of the United States [or treaties made under their authority] in the manner as appears by the complaint of the plaintiff herein, a copy of which is hereunto annexed and made a part of this application, that is to say: [Here state briefly the federal question involved, and of which the United States circuit court is given original jurisdiction.]

[Etc.]

FORM No. 1105—Order of removal made by state court.

[Title of court and cause.]

This cause coming on to be heard upon the application of the defendant herein for an order transferring the same to the United States circuit court for the _____ district of _____, and it appearing to the court that the defendant has filed his petition for such removal in due form of law, that the defendant has filed his bond as provided by law, and it appearing to the court that this is a proper case for removal to said circuit court, on the ground that the parties hereto are citizens of different states [or on the ground that a federal question is involved herein, or state such other ground as exists]:

It is hereby ordered, that this cause be and the same is hereby removed to the United States circuit court in and for the

district of _____, and the clerk is hereby directed to make up the record in this cause for transmission thereto forthwith.

Entered, [etc.].

FORM No. 1106—Bond on removal of action from state to federal court.

[Title of action in state court.]

Know all men by these presents: That we, _____, principal, and _____, of _____, and _____, of _____, state of _____, sureties, are held and firmly bound unto _____ in the sum of \$ _____, lawful money of the United States, to be paid to the said _____, his heirs, executors, administrators, successors, and assigns; for which payment well and truly to be made we bind ourselves, our heirs, executors, and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the _____ day of _____, 19 ____.

Upon condition, nevertheless, that whereas the said _____ has filed a petition in the _____ court, in _____ County, state of _____, for the removal of a certain cause therein pending between the said _____, as plaintiff, and the said _____, as defendant, to the circuit court of the United States in and for the _____ district of _____:

Now, if the said _____ shall enter in the said circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then this obligation to be void; otherwise, to remain in full force and virtue.

[Signature of principal.] [Seal.]

[Signature of surety.] [Seal.]

[Signature of surety.] [Seal.]

[Justification of sureties.]

[Endorsement of approval and of filing in the state court.]

§ 475. ANNOTATIONS.—Change of place of trial.

1. Jurisdiction conferred by application for change.
2. Guarantor.—Venue of action against.
- 3, 4. Arkansas statute construed.
5. Divorce.—Change of venue to where real action is joined.
6. Facts of defense not required to be set forth.
7. Demand and affidavit are essential.
- 8, 9. Affidavit of merits by counsel.
10. "Residence" of a domestic trading corporation.

11. Foreign corporation.—Venue of action against.
12. Affidavit of officer as to residence.
13. Application for removal of cause to federal court.
- 14, 15. Citizenship, diversity of.
16. Averment as to controversy between citizens of different states.
17. Citizenship distinguished from residence.
18. Mandamus to secure change of venue.
19. Right not affected by special appearance.

1. Jurisdiction conferred by application for change.—Taking a change of venue by a defendant before the court in which the case is pending operates as an appearance to the merits and confers jurisdiction over the person: *Feeder v. Schroeder*, 59 Mo. 364; *Speer v. Burlingame*, 61 Mo. App. 75.

2. Guarantor.—Venue of action against.—A motion for change of venue was held to have been properly denied in an action in which the plaintiff joined as parties defendant an original obligor and his guarantor and laid the venue in the county in which the guarantor resided, where the motion was made by the obligor upon an affidavit stating that the claim of guaranty was false, and that the guarantor was made his co-defendant in order that the plaintiff might bring the action in the county in which the guarantor resided; and where a counter-affidavit was filed by the plaintiff to the effect that the guarantor was made defendant not for the purpose of controlling the venue in said action, but because, according to plaintiff's theory, plaintiff was entitled to judgment against either or both of said defendants, and further alleging that the guarantor was a bona fide resident of the county in which the summons was served: *Senn v. Connelly* (S. Dak.), 120 N. W. 1097, 1098.

3. The Arkansas statute (Kirby's Dig., §§ 7996, 7998) construed.—The statute plainly means that if the plaintiff commences an action in a county other than that of his residence, or other than that of the county in which the occurrence of which he complains took place, unless he is compelled to do so in order to get service on the defendant, the latter shall have the right to a change of venue upon presentation of his petition in proper form, duly verified, containing allegations of the statutory grounds of prejudice or undue influence and supported by the affidavits of two credible witnesses: *St. Louis etc. R. Co. v. Furlow*, 81 Ark. 496, 499, 99 S. W. 689. The

language in section 7998 of the statute "upon presenting the petition," etc., plainly contemplates the petition duly verified and the supporting affidavits. If the legislature had intended that the supporting affidavits should accompany the petition as a prerequisite to the granting of a change of venue, it would have used the language "upon presentation of his petition duly verified, together with the supporting affidavits," but the assertion of the one excludes the use of the other. The proviso contained in the latter part of section 7998 is a limitation upon the preceding part of the section. While the conditions contained in the proviso exist, they defeat the operation of the first part of the section; in other words, the proviso conditionally limits the operation of the statute relative to change of venue. It provides that, when the conditions exist, the change of venue shall be granted as a matter of right upon presentation of the petition duly verified: *St. Louis etc. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102, 104.

4. Where an action is not commenced in the county of the plaintiff's residence, nor in the county where the occurrence complained of took place, and it is not necessary to bring the suit in the county in which the action was commenced in order to get service, the defendant, upon presentation of his petition duly verified, is entitled as a matter of right to a change of venue: *St. Louis etc. R. Co. v. McNamare*, 91 Ark. 515, 122 S. W. 102, 103, quoting and construing Kirby's Dig., §§ 7996, 7998, prescribing procedure to obtain an order for change of venue.

5. Divorce.—Change to where real action is joined.—Where in an action for divorce a real action is joined in the complaint, the defendant will be entitled to have the place of trial removed to the county of his residence. Such a case falls within the provisions of section 395 of the Code of Civil Procedure, and the action must be brought in a county wherein the defendant resides; and if

not, a suit so brought must be removed thereto: *Le Breton v. Superior Court*, 66 Cal. 30, 4 Pac. 777; *Ah Fong v. Sternes*, 79 Cal. 33, 21 Pac. 381; *Smith v. Smith*, 88 Cal. 572, 26 Pac. 356; *Warner v. Warner*, 100 Cal. 11, 16, 34 Pac. 523.

6. Facts of defense not required to be set forth.—An affidavit of merits need not state the facts constituting a meritorious defense, but such affidavit should state in substance that affiant has fully and fairly stated the facts of the case to his counsel, and that such counsel had advised him that he has a good legal and meritorious defense. But where the court below seems to have been satisfied with an affidavit merely stating, in this respect, "that the defendant has a good legal and meritorious defense," there is no such abuse of discretion as would justify the appellate court in reversing an order made thereon, especially where such reversal would operate as a final bar to any defense on the part of the defendant: *Howe v. Coldren*, 4 Nev. 171, 177.

7. Demand and affidavit are essential.—Where a party fails at the time of interposing his demurrer to file an affidavit of merits and a demand in writing for a change of the place of trial of the action, he thereby waives his right to such change, even if the facts in reality entitle him to a change: *Bell v. Camm*, 10 Cal. App. 388, 102 Pac. 225, 226, citing *Cook v. Pendergast*, 61 Cal. 78.

8. Affidavit of merits by counsel.—The propriety of counsel for a party making an affidavit as to the merits or legality of the defense is often called in question. Where counsel makes such an affidavit, the better practice would require that he, as affiant, in setting out that the defendant has a good legal and meritorious defense, allege or show in some way that he, as counsel, knows or is familiar with the facts in the case: *Howe v. Coldren*, 4 Nev. 171, 177.

9. An affidavit of merits in which the affiant, among other things, sets forth, "And after such statement I am advised, and verily believe, that I have a good defense on the merits to this action," etc.; held defective, upon the ground that the affiant should have stated that he was advised by his counsel that he had a good defense: *Grangers' Union v. Ash*, 12 Cal. App. 143, 106 Pac. 889, 890. [Author's note: Of this decision it might

well be said, "More subtle web Arachne can not spin." Where the affiant states, as in this case, that he had "fully and fairly stated the case to his counsel," naming him, and "after such statement I am advised," etc., it would hardly seem to require the services of a sleuth to discover who gave the advice.]

10. "Residence" of domestic trading corporation.—A domestic trading corporation resides, within the meaning of section 3951 of the California Code of Civil Procedure, in the county where its principal place of business is, and such place is where designated by its articles of incorporation: *Jenkins v. California Stage Co.*, 22 Cal. 537; *Cohn v. Central Pacific R. Co.*, 71 Cal. 488, 12 Pac. 498; *McSherry v. Penn Co.*, 97 Cal. 637, 32 Pac. 711; *Buck v. Eureka*, 97 Cal. 135, 140, 31 Pac. 845, 846; *Trezvant v. Strong*, 102 Cal. 47, 36 Pac. 395.

11. Foreign corporation.—Venue of actions against.—The rule is different with respect to the right of foreign corporations to change the place of trial. In the absence of any statutory provision fixing the place of trial, in actions against foreign corporations, such action may be brought and maintained in any county of the state. A foreign corporation exists in and by virtue of the law of the foreign country, and no statute of another state can give a local residence to such corporation where alone it can be sued. Its liability to be sued in the courts of such latter state no more confers a comity residence upon it than does the comity which permits it to apply to its courts for the enforcement of a contract for the redress of a wrong: *Thomas v. Placerville G. Q. M. Co.*, 65 Cal. 600, 4 Pac. 641, 643; *Anglo-Californian Bank v. Field*, 146 Cal. 644, 650, 80 Pac. 1080; *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41, 42; *Boyer v. Northern Pacific R. Co.*, 8 Idaho 74, 66 Pac. 826, 70 L. R. A. 691; *Olson v. Osborne*, 30 Minn. 444, 15 N. W. 876.

As to right of foreign corporations, in respect to change of place of trial on the ground of residence, see *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41, 42.

12. Affidavit of officer as to residence.—An affidavit of an officer of a foreign corporation, without sanction of the statute for such a proceeding, can not be held to admit such a corporation to

the constitutional rights and privileges of a domestic corporation with respect to its principal place of business for the purpose of establishing its residence in another state: *Waechter v. Atchison etc. R. Co.*, 10 Cal. App. 70, 101 Pac. 41, 43.

13. Application for removal of cause to federal court.—It has been held, where a petition for removal of a cause from a state to the federal court is made and based upon the theory that the cause of action or controversy involved is separable with reference to the parties joined as defendants, and that, although one of the defendants was a citizen of Colorado, the remaining defendant was a Wyoming corporation, such application is properly denied where the matters alleged in the complaint constitute concurrent acts of negligence against the defendants, and where on the face of the complaint it can not be said that the controversy is separable: *Stratton Cripple Creek etc. Co. v. Ellison*, 42 Colo. 498, 94 Pac. 303, 305, (negligence resulting in personal injuries suffered in a mine).

14. Citizenship, diversity of.—To render an action removable to the federal court on the ground of alleged diversity of citizenship, is not enough to aver generally that plaintiff [or defendant] is not a citizen of a particular state, or not of the state in which the suit is pending: *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. ed. 132.

15. Distinct statements of the citizenship of the parties, and of the particular state in which it is claimed such citizenship exists are required: *Cameron v. Hodges*, 127 U. S. 322, 8 Sup. Ct. 1154, 32 L. ed. 132; *O'Connor v. Chicago etc. Co. (Iowa)*, 122 N. W. 947, 949.

16. Averment as to controversy between citizens of different states.—To aver that the controversy is between citizens of different states is but a con-

clusion, where it precedes specific allegations of facts by way of explanation, or follows them as an inference to be drawn therefrom: *O'Connor v. Chicago etc. Co. (Iowa)*, 122 N. W. 947, 949, citing *Neel v. Penn Co.*, 157 U. S. 153, 15 Sup. Ct. 589, 39 L. ed. 654; *Continental Life Ins. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *Grace v. American Central I. Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. ed. 932.

17. Citizenship distinguished from residence.—Citizenship can not be inferred from an averment as to residence, for the reason that a person may be a citizen of a state although a resident of another: *Continental Life I. Co. v. Rhoads*, 119 U. S. 237, 7 Sup. Ct. 193, 30 L. ed. 380; *O'Connor v. Chicago etc. Co. (Iowa)*, 122 N. W. 947, 950.

18. Mandamus to secure change of venue.—Mandamus lies to compel a judge to grant a change of venue where the moving party has a clear legal right thereto: *State v. Dick*, 103 Wis. 407, 79 N. W. 421, construing § 3069 Rev. Stats. 1898, under which an order denying change of venue is unappealable. See *Gamble v. First Judicial Dist. Court*, 27 Nev. 233, 74 Pac. 530. Compare *People v. Church*, 103 Ill. App. 132; *Galbraith v. Williams*, 21 Ky. Law Rep. 79, 106 Ky. 431, 50 S. W. 686. So, also, mandamus will lie to compel the court to hear and determine a motion for change of venue to the county of defendant's residence: *Hennessey v. Nicol*, 105 Cal. 138, 142, 38 Pac. 649.

19. Right not affected by special appearance.—A special appearance by motion to strike out portions of the complaint made before or at the time of filing the demurrer is not such an appearance and submission to the court's jurisdiction as constitutes a waiver of the right to move for a change of venue: *Wood v. Herrman Min. Co.*, 129 Cal. 712, 717, 73 Pac. 538.

CHAPTER CXXXV.

Appearance and Default, and Substitution of Attorneys.

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§ 476. APPEARANCES.

FORM No. 1107—Notice of special appearance.

[Title of court and cause.]

To A. B., attorney for plaintiff:

Please take notice, that the undersigned appears in this action for the defendant, M. N., for the special purpose of [stating the special purpose] and for no other purpose.

[Date.] C. D., Attorney for defendant, specially appearing.

FORM No. 1108—Notice of general appearance.

[Title of court and cause.]

To A. B., attorney for plaintiff [or other party, naming him]:

Please take notice, that the undersigned appears for the defendant, M. N., in this action.

[Date.] C. D., Attorney for defendant [or other party.]

FORM No. 1109—Acknowledgment of service.

[Title of court and cause.]

The undersigned, attorney for plaintiff, hereby acknowledges service of [here naming the instrument served].

[Date.] A. B., Attorney for plaintiff.

§ 477. DEFAULTS.**FORM No. 1110—Application for entry of default.**(From the record in *Nixon v. Goodwin*, 3 Cal. App. 358; 85 Pac. 169.)

[Title of court and cause.]

In this action the defendant [M. C. Co.], having been regularly served with process, and having failed to appear and demur or answer to the plaintiff's complaint herein, and the legal time for demurring or answering having expired, application is hereby made by the plaintiff to the clerk of said court for the entry of a default against said defendant.

Dated June 4, 1901.

[Endorsement of filing.]

Tabor & Tabor,

Attorneys for plaintiff.

FORM No. 1111—Clerk's entry of default of defendant for failure to appear.(In *Angus v. Craven*, 132 Cal. 691; 64 Pac. 1091.)

[Title of court and cause.]

In this action the defendant, Elizabeth Haskins, having been legally served with process, and having failed to appear and answer [or demur] to the complaint [in intervention] on file herein, and the time allowed by law for answering [or demurring] having expired, the default of said defendant in the premises is hereby duly entered according to law.

Attest my hand and seal of said court, this 11th day of September, 1897.

C. F. Curry, Clerk.

By E. P. Peterson, Deputy Clerk.

FORM No. 1112—Stipulation to set aside judgment by default and to reopen cause.

[Title of court and cause.]

It is hereby stipulated and agreed by and between the parties hereto, that the judgment entered herein on the day of , 19 , be set aside, and that the defendant be given leave to file his demurrer herein and pursue such other defenses as he may be advised.

It is further stipulated, that such order or orders may be made herein as may be necessary for the purposes of this stipulation.

[Date.]

A. B., Attorney for plaintiff.

C. D., Attorney for defendant.

FORM No. 1113—Order on stipulation, setting aside default judgment.

[Title of court and cause.]

Good cause appearing therefor, and pursuant to a stipulation between the parties hereto, made and entered into on , 19 , and filed herein:

It is hereby ordered, that the judgment entered herein on the day of , 19 , be and the same is hereby vacated and set aside, and defendant is hereby given leave to file his demurrer herein, and to pursue such other defenses herein as he may be advised.

[Date.]

S. T., Judge.

§ 478. SUBSTITUTION OF ATTORNEYS.**FORM No. 1114—Notice of substitution of attorneys.**

(In McFarland v. Matthai, 7 Cal. App. 599; 95 Pac. 179.)

[Title of court and cause.]

To , defendants herein, and to , their attorneys:

Please take notice, that after this day I have substituted Bell, York & Bell, as my attorneys, in the place and stead of Percy S. King, and that the said Percy S. King has in writing consented to the said substitution.

Dated April 12, 1905.

Abel McFarland, Plaintiff.

Bell, York & Bell,

Attorneys for plaintiff.

FORM No. 1115—Consent to substitution of attorneys.

(In McFarland v. Matthai, 7 Cal. App. 599; 95 Pac. 179.)

[Title of court and cause.]

Consent and notice is hereby given of the substitution of Bell, York & Bell, as attorneys for the plaintiff, for and in the place and stead of the undersigned.

Dated Jan. 20, 1904.

Percy S. King,

Attorney for the plaintiff.

FORM No. 1116—Acknowledgment of notice and service of substitution.

[Title of court and cause.]

Due notice and service of a copy of the above notice of substitution of attorneys for the plaintiff [or defendant] in the above-entitled action is hereby admitted this day of , 19 .

A. B., Attorney for defendant [or plaintiff].

§ 479. ANNOTATIONS.—Appearance and default, and substitution of attorneys.

1. Appearance.—Effect of request for time to answer.
- 2, 3. Asking permission to plead to merits.
- 4, 5. Appearance to merits.
6. Setting cause for trial.
- 7, 8. Effect of general appearance.
9. Statutory provisions as to general appearance.
10. Entry of general appearance on appeal.
11. Default.—Effect of entry.
12. Issues of law preclude default.
13. Substitution.—California procedure.
14. Notice of substitution by citation.—Washington practice.
15. Wisconsin rule.
16. Substitution pending appeal.
17. Authority to attorney coupled with interest.
18. Service of notice of appeal where no substitution is made.

1. APPEARANCE.—Effect of request for time to answer.—A request for time in which to answer the merits constitutes a general appearance, the effect and scope of which may not be limited by any statement on the part of counsel that he desires the record to show that his appearance is special: *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 1100.

2. Asking permission to plead to merits.—Where a party appears, either before or after judgment, and asks permission to plead to the merits of the cause, he thereby waives all irregularities in the service of process: *Mayer v. Mayer*, 27 Ore. 133, 39 Pac. 1002, cited and approved in *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 1101. It is a settled rule that if a party desires to take advantage of want of service of process sufficient to give the court jurisdiction of his person, he must specially appear for that purpose only: *Gilbert-Arnold L. Co. v. O'Hare*, 93 Wis. 194, 67 N. W. 38.

3. A defendant waives his right to object to a judgment for want of proper service of summons by appearing and asking leave to answer to the merits: *Mayer v. Mayer*, 27 Ore. 133, 39 Pac. 1002; *Anderson v. McClellan* (Ore.), 102 Pac. 1015, 1016, (ejectment).

4. Appearance to the merits.—An appearance by the defendant to the merits of the action, in a case where the court is possessed of jurisdiction over the subject-matter, confers complete jurisdiction over the person: *Columbia Brewery Co. v. Forgey*, 140 Mo. App. 605, 120 S. W. 625, 628; *Wicecarver v.*

Mercantile etc. Ins. Co., 137 Mo. App. 247, 117 S. W. 698; *Thomasson v. Mercantile etc. Ins. Co.*, 114 Mo. App. 109, 89 S. W. 564, 1135, 116 S. W. 1092; *McClure v. Paducah Iron Co.*, 90 Mo. App. 567.

5. An answer to the merits, as a general rule, operates as a voluntary appearance: *Wicecarver v. Mercantile etc. I. Co.*, 137 Mo. App. 247, 117 S. W. 698, 701. Appearance by demurrer is a general appearance, even though it is stated therein that the appearance is made simply and only for the purposes of the demurrer: *McDonald v. Agnew*, 122 Cal. 448, 450, 55 Pac. 125; and it is held, that where an appearance is made to challenge a judgment or order not merely on jurisdictional grounds, but also on non-jurisdictional grounds, the appearance is general, no matter what the parties may call it in their motion: *Burdette v. Corgan*, 26 Kan. 102.

6. Setting cause for trial.—An appearance for the purpose of setting a cause for trial operates to waive the matter of jurisdiction over the person of the defendant and confers jurisdiction upon the court to proceed: *Orear v. Clough*, 52 Mo. 55.

7. Effect of general appearance.—A general appearance is equivalent to personal service of summons: *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 1100, citing *Anderson v. Burchett*, 48 Kan. 781, 30 Pac. 174.

8. The service of the summons and of a copy of the complaint, or the voluntary appearance of the defendant, invests the court with jurisdiction of the parties and control of all the subsequent

proceedings: *Bell v. Camm*, 10 Cal. App. 388, 102 Pac. 225, 226, construing Cal. Code Civ. Proc., § 416.

9. **Statutory provisions as to general appearance.**—Where the statute defines what shall constitute an appearance,—as, for instance, under section 1014 of the California Code of Civil Procedure, "A defendant appears in an action when he answers, demurs or gives written notice of his appearance, or when an attorney gives notice for him, and he can appear in no other way"; held, that the manner and effect of appearances are determined by the statute alone: *Vrooman v. Li Po Tai*, 113 Cal. 302, 45 Pac. 470; *Powers v. Braly*, 75 Cal. 237, 17 Pac. 197; *Benedict v. Arnoux*, 38 N. Y. Supp. 882; *Bell v. Good*, 22 Civ. Proc. Rep. 317, 356, 19 N. Y. Supp. 693, citing N. Y. Code Civ. Proc., § 421, Cal. Code Civ. Proc., § 1014. The principle involved in the California and New York cases is called in question in some jurisdictions, inasmuch as it is evidently not the intention of the legislature to make the means defined in the statute the only means by which a defendant may appear. The purpose of the statute is simply to assure the defendant of notice of all subsequent proceedings in the cause after he had filed and served an answer, demurrer, or notice of appearance: *State ex rel. Curtis v. McCullough*, 3 Nev. 202; *State ex rel. Mackey v. District Court*, 40 Mont. 359, 106 Pac. 1098, 1101.

10. **Entry of a general appearance on appeal, without reserving or alluding to a special appearance, waives the special appearance and gives the appellate court full and complete jurisdiction over the subject-matter of the action and the parties to the appeal:** *Columbia etc. R. Co. v. Moss*, 53 Wash. 512, 102 Pac. 439.

11. **DEFAULT.**—Entry of default presupposes that the demurrer and motion had been acted upon and overruled and no answer made: *Smith v. Clyne*, 16 Idaho 466, 101 Pac. 819.

12. **Issues of law preclude default.**—Where issues of law are presented, either upon demurrer or motion, the court is required to decide the same, and the defendant is not in default until such issues of law are disposed of: *Winchester v. Black*, 134 Cal. 125, 66 Pac. 197; *Oliphant v. Whitney*, 34 Cal. 25. See, also, *Smith v. Clyne*, 16 Idaho 466, 101 Pac. 819, 820.

13. **SUBSTITUTION.**—California procedure.—A substitution or change of attorneys may be made under the California Code of Civil Procedure (§ 285), in one of two ways: (1) Upon consent of both attorney and client filed with the clerk or entered upon the minutes; or (2) upon the order of the court upon the application of either client or attorney, after notice from one to the other. Where the mode last designated is employed, a petition is insufficient which does not allege that notice was given: *Rundberg v. Belcher*, 118 Cal. 589, 590, 50 Pac. 670, (denying application for writ of mandate to compel substitution).

14. **Notice of substitution by citation.**—Washington practice.—Under a Washington statute (§ 4769 Bal. Code), to the effect that a substitution may be ordered at any time before judgment or final determination, provided the charges of the attorney have been paid, it is immaterial as to what method of giving notice of the motion is employed so long as reasonable notice is given. While the usual method is by notice of motion, there can be no valid objection to notice by citation: *Schulteis v. Nash*, 27 Wash. 250, 67 Pac. 707. Under the California statute, the indebtedness of a client to his attorney for services rendered in the action can not prevent substitution: *Gage v. Atwater*, 136 Cal. 170, 172, 68 Pac. 581.

15. **Wisconsin rule.**—Under the Wisconsin practice, substitution of an attorney shall be granted only where consent in writing, signed by the party and his attorney, is given; or for cause shown on due notice to the court or judge, upon such terms as shall be just: *Circuit Court Rule V*, § 2, construed in *McMahon v. Snyder*, 117 Wis. 463, 466, 94 N. W. 351.

16. **Substitution pending appeal.**—Substitution must be made in the trial court where, after default entered and appeal taken, motion is made to that end, and, when so made, the substituted attorney will be ordered substituted as the attorney of record on the appeal: *Woodbury v. Nevada S. R. Co.*, 120 Cal. 367, 368, 52 Pac. 650. See *Chamberlain v. Hedger*, 10 S. Dak. 290, 73 N. W. 75. And substitution of an attorney after appeal should be followed by like substitution in the trial court: *Reay v.*

Heazelton, 128 Cal. 335, 338, 60 Pac. 977.

17. Authority to attorney coupled with interest.—Form of authority to attorney to prosecute to settlement and judgment an action for damages, with authority to compromise, etc.: Gulf Colorado etc. R. Co. v. Miller, 21 Tex. Civ. App. 609, 610, 53 S. W. 709, (authority held not revocable at the instance of the client alone, in the absence of fraud, because of interest coupled with the contract).

18. Service of notice of appeal where no substitution is made.—Service of notice of appeal on attorney who signed original answer of defendant, although another signed the amended answer, where there was never any substitution of attorneys, is good, although the defendant represented by such attorney was dead at the time of service: Lacoste v. Eastland, 117 Cal. 673, 680, 49 Pac. 1046.

CHAPTER CXXXVI.

Notices, Motions, and Orders.

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§ 480. NOTICE OF PENDENCY OF ACTION.**FORM No. 1117—Common form.**

[Title of court and cause.]

Notice is hereby given, that on the day of , 19 , an action was commenced in the above-entitled court and cause for the [here state the nature of the action affecting the title or right of possession of the real property involved]; that the names of the parties here:to are as follows: [Here name all the parties, and whether plaintiff or defendant]; that the object of said action [or defense] is as follows: [Here state the object of the action or defense, whether foreclosure, to quiet title, ejectment, for partition, to establish a trust in the lands, etc.]; that the following is a description of the property affected by said action [or defense], to wit: [Here describe property, following the same description as contained in the complaint, or cross-complaint, etc.]

[Date.]

[Signature of plaintiff.]

Or, A. B., Attorney for plaintiff.

[Under the statutes, generally, the plaintiff, where the complaint (or petition) affects the title or the right of possession to real property, or the defendant, cross-complainant, or intervener, where an affirmative cause is set up in the answer, cross-complaint, or complaint in intervention, may, and should, record at the time of filing the particular pleading, or within a time subsequently as provided by statute, a notice of the pendency of the action. A reference should be made to the particular statute of the state relating to such notice as to the time and manner of recording the same.]

§ 481. NOTICES, GENERALLY.**FORM No. 1118—Notice of decision.**

[Title of court and cause.]

To defendant, , and to , his attorney:

You will please take notice, that in the above-entitled action decision was rendered, and written findings of fact and conclusions of law signed and filed therein, on , 19 , in favor of plaintiff and against the defendant, in accordance with the prayer of plaintiff's complaint; that judgment and decree were thereupon on said day signed and filed in favor of plaintiff and against defendant [quieting the title of plaintiff as against said defendants in and to the real estate in plaintiff's complaint described; or state substance of other relief granted]; that said decree and judgment has been entered in the office of the county clerk of the county of , state of .

[Date.]

A. B., Attorney for plaintiff.

FORM No. 1119—Notice of decision in favor of defendants and cross-complainant.

(In *Gish v. Ferrea*, 10 Cal. App. 53; 101 Pac. 27.)

[Title of court and cause.]

To the above-named plaintiff, and to Hugo D. Newhouse, Esq., her attorney:

You, and each of you, will please take notice, that the above-entitled court has rendered judgment in favor of defendants, and in favor of cross-complainant, J. P. LeFevre, and against plaintiff, in the above-entitled action [etc., as in preceding form].

Dated this 16th day of April, 1908.

Berry & Brady,

Attorneys for defendants and cross-complainant.

[Endorsement of filing.]

FORM No. 1120—Notice of time of trial. (With waiver by plaintiff of trial by jury.)

[Title of court and cause.]

To the defendants in the above-entitled action, and their respective attorneys:

You are hereby notified, that the trial of the above-named cause has been set for the hour of 10 o'clock A. M. on _____, 19____, at the courtroom of said court, in the courthouse at _____, in the county of _____, and that said cause will be tried at said time and place, and you are further notified that the plaintiff hereby waives a trial by jury.

[Date.]

A. B., Attorney for plaintiff.

FORM No. 1121—Notice to produce documents for use on the trial.

[Title of court and cause.]

To defendant, _____, and to _____, his attorney:

Notice is hereby given to you, and each of you, that plaintiff hereby demands of you, and of each of you, that you have and produce at the trial of the above-named action set for _____, 19____, at the hour of 10 o'clock A. M. at the courthouse in the county of _____, state of _____, the following:

[Here designate books, papers, etc., desired.] And you are hereby notified, that upon the failure upon the part of you, or either of you, to have said [here designating] at said trial, plaintiff will object to

the admission of any evidence concerning any matter relating to matters set forth or referred to in said [here designate books, etc., as above].

[Date.]

A. B., Attorney for plaintiff.

FORM No. 1122—Notice of motion to dismiss action.

(In Siskiyou County Bank v. Hoyt, 132 Cal. 81; 64 Pac. 118.)

[Title of court and cause.]

To plaintiff, and to Messrs. Gillis & Tapscott, its attorneys:

You will please take notice, that Elizabeth Hoyt, one of the defendants in the above-entitled action, will make special appearance in said cause, before said court, and for that purpose only, will, upon the 23d day of December, 1899, at the hour of ten o'clock A. M., or as soon thereafter as counsel can be heard, move this court to dismiss said action.

Said motion will be made upon the records, files, and papers in said cause, and upon the ground that no summons was ever issued within a year after the filing of the complaint therein;

Also upon the ground that no service of the complaint or summons has ever been made upon her within the period of three years before the commencement of said action; and that she has never appeared or made answer to said complaint.

[Date.]

Warren & Taylor,
Attorneys for defendants.

FORM No. 1123—Notice of overruling demurrer and granting time to answer.

[Title of court and cause.]

To the defendant in the above-entitled action, and to A. B., his attorney:

Please take notice, that the demurrer interposed by you to the complaint of plaintiff herein was on the day of , 19 , by the court overruled; and by said order you have been granted ten days from the date of this notice in which to answer the complaint herein.

[Date.]

A. B.,
Attorney for plaintiff.

[Admission of service—annexed to foregoing notice, upon service thereof.]

Due service of the foregoing notice of overruling demurrer is hereby admitted this day of , 19 .

C. D., Attorney for defendant.

§ 482. ORDERS.**FORM No. 1124—Order extending time to plead.**

[Title of court and cause.]

Good cause appearing therefor, it is hereby ordered, that the defendant, _____, have to and including the _____ day of _____, 19____, in which to plead to the complaint [or other paper, naming it] herein.

[Date.]

S. T., Judge.

FORM No. 1125—Order assigning cause.

(In *Dodge v. Ridenour*, 62 Cal. 263.)

[Title of court and cause.]

It is ordered, that the above-entitled cause, pending in the district court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, on the 31st day of December, 1879, be and the same is hereby assigned to department No. 2 of this court.

William P. Daingerfield,
Superior Judge, presiding.

FORM No. 1126—Order denying or overruling motion in general.

[Title of court and cause.]

Hearing upon motion of plaintiff [or defendant] herein [here designate the nature of the motion], coming on this day regularly to be heard, and the same being submitted, said motion is hereby granted [or denied]. [If the motion be granted, state effect specifically.]

[Date.]

S. T., Judge.

FORM No. 1127—Order on motion to strike pleading from the files.

[Title of court and cause.]

The motion of the plaintiff [or defendant] herein to strike out the answer [or other pleading to which motion is directed, naming it], coming on regularly to be heard, and the court being duly advised in the premises, the said motion is hereby denied [or granted, as the case may be].

[Date.]

S. T., Judge.

FORM No. 1128—Order granting time to answer upon overruling demurrer.

(In Braly v. Fresno City R. Co., 9 Cal. App. 417; 99 Pac. 400.)

[Title of court and cause.]

It is ordered, that the demurrer of defendant to the complaint of plaintiff be and the same is hereby overruled, and defendant is hereby granted ten days in which to answer after notice.

[Date.]

George E. Church,
Judge of Superior Court.

FORM No. 1129—Order granting time to amend after sustaining demurrer.

(In McFarland v. Matthai, 7 Cal. App. 599; 95 Pac. 179.)

[Title of court and cause.]

The demurrer in the above-entitled action coming on regularly to be heard, P. S. King appearing for the plaintiff, and Louise Matthai, one of the defendants, appearing for the defendants:

The court, after hearing the argument, orders that the demurrer be and the same is hereby sustained, and the defendants are given ten days to amend their [cross-] complaint herein.

In open court, Jan. 29, 1900.

FORM No. 1130—Order to show cause.

[Title of court and cause.]

On reading the petition of A. B., [creditor of the above-named decedent,] this day presented to me in the above-entitled proceeding, praying that an order may be made in said matter adjudging and decreeing that [here state]; and it appearing to me from said petition [that it is necessary to sell some portion of the property belonging to said estate for the purpose of paying the debts outstanding against the decedent, etc.]; it is ordered, that said petition be filed with the clerk of this court, and that all persons interested in the said estate appear before this court on the day of , 19 , at o'clock A. M. of said day, at the courtroom thereof, department No. , at , in the city of , then and there to show cause, if any they have, why an order shall not be granted [directing a sale of a portion of the property of the said estate, as prayed for in the said petition, etc.]. And it is further ordered, that a copy of this order be published once a week for four successive weeks in "The Daily ," a newspaper published in the said county of .

[Date.]

S. T., Judge.

FORM No. 1131—Order suspending power of executor.

[Title of court and cause.]

T. M., widow of L. M., deceased, having heretofore presented her petition asking for the suspension of the powers of X. Y., executor of the last will of said deceased, and presenting her reasons therefor, and the court having examined said petition and certain proofs in support thereof, and it appearing to the court that there is reason to believe that the said X. Y., executor of the last will of the said deceased, [has wasted and mismanaged the property of the said estate committed to his charge, and has committed fraud upon the said estate, and has wrongfully neglected the said estate, in the particulars stated in said petition, etc.] :

It is by the court ordered, that the powers of the said X. Y., as executor of the last will of said L. M., deceased, be and the same are hereby suspended until the matters alleged in said petition are investigated as herein provided.

And it is further ordered, that the said X. Y. be cited to appear before this court, in department No. thereof, on , the day of , 19 , at o'clock M. of that day, then and there to show cause, if any he has, why the letters testamentary, heretofore issued to him as executor of the last will of said L. M., deceased, should not be revoked.

[Date.]

S. T., Judge.

FORM No. 1132—Restraining order to executor, and order to show cause.

[Title of court and cause.]

Upon reading and filing the petition of T. M., widow of said deceased, entitled "Petition of T. M. for a restraining order and for citation to the executor," and good cause appearing therefor :

It is by the court ordered, that X. Y., executor of the will of said L. M., deceased, be and he is hereby enjoined and restrained until the further order of the court from [state the acts enjoined].

And it is further ordered, that said X. Y., as said executor, appear and show cause herein, if any he has, at the courtroom, department No. of this court, at o'clock M. on , the day of , 19 , why the prayer of said petition should not be granted.

[Date.]

S. T., Judge.

FORM No. 1133—Order revoking letters testamentary.

[Title of court and cause.]

The court having heard the testimony produced at the trial upon the issues made by the petition of T. M., widow of said deceased, for the revocation of the letters testamentary heretofore issued to X. Y., and the answer [or return] of the said X. Y. thereto, and the matter having been submitted to the court, after argument, for decision, and the court having made and filed its findings of fact and conclusions of law; it is now by the court, in accordance with said findings of fact and conclusions of law:

Ordered, adjudged, and decreed, that said letters testamentary heretofore issued to said X. Y., as executor of the last will of L. M., deceased, be and the same are hereby revoked.

[Date.]

S. T., Judge.

§ 483. ANNOTATIONS.—Notices, motions, and orders.

- 1, 2. "Motion" defined.—Not a pleading.
3. Petition as motion.
4. Order to show cause as motion.
5. Motion distinguished from notice.
6. Leave to renew motion.
- 7, 8. Motion as remedy to set aside judgment procured by fraud.
9. Motion granted on one of many grounds.
10. "Order" defined.
- 11, 12. Interlocutory decree as an order.
13. Judgment, so-called, as an order.
14. Amending record by nunc pro tunc order.

1. "Motion" defined.—A motion is an application for an order or direction of the court not included in the judgment: *Estate of Harrington*, 147 Cal. 124, 128, 81 Pac. 546. And see *Williams v. Hawley*, 144 Cal. 97, 77 Pac. 762, citing the California code definition, that a motion is an application for an order (§ 1003, Cal. C. C. P.).

2. A motion is not a pleading within the meaning of that term: *Graff v. Dougherty*, 139 Mo. App. 56, 120 S. W. 661, 663.

3. Petition as motion.—A petition to a court of equity for an order directing the payment of moneys in the hands of a receiver is a motion. It is of no consequence whether the verified statement of the petitioner be termed a complaint, a petition in the nature of a complaint, or an affidavit: *California Title Ins. etc. Co. v. Consolidated P. C. Co.*, 117 Cal. 237, 240, 49 Pac. 1.

4. Order to show cause as motion.—An order to show cause returnable at a specified time less than that prescribed by statute is the equivalent of a motion and order shortening time for the hearing thereof: *Dabman v. White*, 48 Cal. 439, 451.

5. Motion distinguished from notice.—A notice of motion is distinct from the motion itself. Notice alone is not sufficient on appeal to show the making of a motion: *Herrlich v. McDonald*, 80 Cal. 472, 474, 22 Pac. 299.

6. Leave to renew a motion once denied lies in the discretion of the court: *Mace v. O'Reilly*, 70 Cal. 231, 11 Pac. 721.

7. Motion as remedy to set aside a judgment procured by fraud.—A motion predicated in part upon equitable grounds which would no doubt support a bill in equity on the ground of fraud perpetrated in the act of procuring a

judgment is proper to secure relief to set aside such judgment. The ancient right founded on the grounds *coram nobis* is superseded in our practice by the modern motion to the same effect: *Graff v. Dougherty*, 139 Mo. App. 56, 120 S. W. 661, 662, citing *Downing v. Still*, 43 Mo. 309; *Cross v. Gould*, 131 Mo. App. 585, 110 S. W. 672; *Fisher v. Fisher*, 114 Mo. App. 627, 90 S. W. 413.

8. Where a motion is made to set aside a judgment rendered against a defendant in his absence, and no defense other than that stated in the answer is presented, the question thereupon rests on the sufficiency of such answer, and where this is insufficient, the judgment is proper, and the motion to set it aside will therefore be denied: *Plunkett v. State National Bank*, 90 Ark. 86, 117 S. W. 1079, 1080.

9. Motion granted on one of many grounds.—Where the granting of an order is proper upon any of the statutory grounds, the court may grant the motion on one of the grounds stated, and may disregard other grounds: *Toy v. Haskell*, 128 Cal. 558, 561, 61 Pac. 89, 79 Am. St. Rep. 70.

10. "Order" defined.—An order is a decision made during the progress of the cause, either prior or subsequent to final judgment, settling some point of practice, or some question collateral to the main issue presented by the pleadings

and necessary to be disposed of before such issue be passed upon by the court, or necessary to be determined in carrying into execution the final judgment: *Loring v. Illsley*, 1 Cal. 24, 27; *Estate of Rose*, 80 Cal. 166, 170, 22 Pac. 86; *Estate of Smith*, 98 Cal. 636, 640, 33 Pac. 744.

11. An interlocutory decree is an order, and not a judgment, in so far that, except where expressly provided by statute, an appeal will not lie; but it may be reviewed on an appeal from the judgment: *Watson v. Sutro*, 77 Cal. 609, 611, 20 Pac. 88.

12. An interlocutory decree in probate settling an administrator's accounts is not a final judgment, but a mere order: *Estate of Rose*, 80 Cal. 166, 169, 22 Pac. 86.

13. Judgment, so-called, as an order.—The judgment of a court refusing to admit a will to probate is not a final judgment, but an order of court: *Estate of Smith*, 98 Cal. 166, 638, 33 Pac. 744.

14. Amending record by *nunc pro tunc* order.—The authority of a court to amend its record by a *nunc pro tunc* order is to make it speak the truth, but not to make it speak what it did not speak, but ought to have spoken: *Tucker v. Hawkins*, 72 Ark. 21, 77 S. W. 902; *Liddell v. Landan*, 87 Ark. 438, 112 S. W. 1085; *Boulden v. Jennings* (Ark.), 122 S. W. 639, 641.

CHAPTER CXXXVII.

Affidavits, Depositions, and Stipulations.

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§ 484. AFFIDAVITS.

FORM No. 1134—Affidavit of service of notice on a person not an attorney.

[Venue.]

, being duly sworn, says: That he served the notice [or other paper, naming it], of which the annexed is a true copy, on [naming the person served] on the day of , 19 , by delivering said notice [or other paper, naming it] to said per- sonally, at his residence in the city [or town] of . [In case of a notice, service is generally required by statute to be made upon the attorney, hence the affiant should add, where service of notice is made, the reasons why service could not be made on the attorney.]

[Signature.]

[Jurat.]

FORM No. 1135—Affidavit of service of notice by mail.

[Venue.]

, being duly sworn, says: That he is the attorney for the plaintiff [or defendant] in the action entitled in the notice, of which the annexed is a true copy; that he served said notice on , the

attorney for the defendant [or plaintiff] in said action, on the day of _____, 19____, by depositing said notice on said _____ day of _____ in the post-office at the city [or town] of _____, in the state of _____, enclosed in a sealed envelope, directed to said _____, attorney for defendant [or plaintiff], at his address, to wit, No. _____ Street, city of _____, state of _____, which city [or town] of _____ was then the place of residence of said _____; that affiant pre-paid the postage thereon; that there was then, and has been ever since, a regular communication by mail between said cities [or towns]; that said attorney for defendant [or plaintiff] had no office in said city of _____ at that time.

[Signature.]

[Jurat.]

FORM No. 1136—Affidavit of service of notice on an attorney absent from his office.

[Venue.]

_____, being duly sworn, deposes and says: That he is the attorney for the plaintiff [or defendant] in the action entitled in the notice, of which the annexed is a true copy; that he served said notice on _____, the attorney for defendant [or plaintiff] in said action, by leaving the same in the office of said _____, No. _____ Street, in the city of _____, in this state, on the _____ day of _____, 19____, at or about the hour of _____ M. of said day [observing the statute as to service required to be made during business hours], and in a conspicuous place on the desk of said _____, in his said office; that there was no one in charge of the said office at the time of such service.

[Signature.]

[Jurat.]

FORM No. 1137—Affidavit of service of notice on an attorney at his residence when his office is closed.

[Venue.]

_____, being duly sworn, says: That he is the attorney for the plaintiff [or defendant] in the action entitled in the notice, of which the annexed is a copy; that affiant served said notice on _____, the attorney of the defendant [or plaintiff] named in said action in the city [or town] of _____, in this state, on the _____ day of _____, 19____, by leaving said notice at the residence of said _____, in said city [or

town] of , with , who was then over years of age, and was and is a person of discretion, and who resided at the said residence of said at the time of said service; that the office of said was not open at the time said service was made; and that said office was then in the county in which his said residence was situated.

[Signature.]

[Jurat.]

FORM No. 1138—Affidavit of service of notice on an attorney at office in charge of a clerk or other person.

[Venue.]

, being duly sworn, says: That he is the attorney for the plaintiff [or defendant] in the action entitled in the notice, of which the annexed is a true copy; that he served said notice on , the attorney for the defendant [or plaintiff] named in said action, by delivering the same to [here naming the clerk or other person in charge] in the office of said , who at the time of such service was the clerk [or had charge of said office] of said ; that the said attorney for the defendant [or plaintiff] was absent from his said office at the time of said service.

[Signature.]

[Jurat.]

**FORM No. 1139—Affidavit of service of summons on several defendants.
(Endorsed on original summons.)**

State of , }
County of . } ss.

, being duly sworn, deposes and says: That he is, and was at the time of the service of the summons herein referred to, a citizen of the United States, over the age of eighteen years, and not a party to the within-entitled action; that he personally served the within summons on the hereinafter-named defendants, whom deponent knew to be the persons named in the summons, by delivering to and leaving with each of said defendants personally, at the places hereinafter set forth, in the state of , and at the time set opposite their respective names, a copy of said summons attached to a copy of the complaint referred to in said summons.

| | | |
|-----------------------------|---------------------|------------------|
| Names of defendants served: | Place where served: | Time of service: |
| | | |

[Affiant's signature.]

[Jurat.]

FORM No. 1140—Affidavit of service of citation.

[Title of court and cause.]

State of , }
County of . } ss.

J. F., being duly sworn, says: That he is a citizen of the United States and of the state of , and over the age of twenty-one years; that he is not interested in the within-named matter, and is competent to be a witness upon the hearing thereof; that on the day of , 19 , he served the within original citation upon X. Y., the executor of the last will and testament of L. M., deceased, in the city of , county of [by showing him said original and delivering a true copy thereof to him]; that affiant also served upon said X. Y., as such executor, personally, a copy of the order to show cause pursuant to which said citation was issued, and a copy of the petition mentioned in said citation, by delivering copies of each thereof to, and leaving the same with, the said X. Y.

[Affiant's signature.]

[Jurat.]

§ 485. DEPOSITIONS.

FORM No. 1141—Stipulation of counsel to take depositions.

[Title of court and cause.]

It is hereby stipulated by the parties hereto, that the deposition of , a witness on behalf of the plaintiff [or defendant] in this action [or proceeding], be taken before , a notary public in and for the county of , in the state of , at his office in said county of , on the day of , 19 , commencing at [state the time]; and it is further stipulated, that when taken and certified to by said officer, and transmitted to the clerk of said court, such deposition may be read by either party to the action [or proceeding] as evidence on the trial of the action [or proceeding], sub-

ject, however, to all legal objections and exceptions that could be taken in case the witness was personally present and testified in the action.

[Date.]

A. B., Attorney for plaintiff.

C. D., Attorney for defendant.

FORM No. 1142—Affidavit upon taking deposition of defendant as witness for plaintiff.

[Title of court and cause.]

State of California, }
County of . } ss.

, being duly sworn, deposes and says: That he is one of the attorneys for plaintiff in the above-entitled action; that the summons in said action has been heretofore served upon , defendant in said action; that said defendant, , is a party to said action, and has heretofore appeared and answered therein; that said , defendant, resides in the county of , state of California; and within twenty-five miles of the city of , in said county of , and within said distance of the office of , a notary public in and for said County, before whom the deposition of said defendant is noticed to be taken.

[Signature of affiant.]

[Jurat.]

FORM No. 1143—Affidavit for taking the deposition of a resident witness.

[Title of court and cause.]

[Venue.]

A. B., being duly sworn, deposes and says: That he is the plaintiff [or the defendant] in the above-entitled action [or proceeding]; that the summons in the action has been served [or, that the defendant has appeared therein; or, in a special proceeding, that a question of fact has arisen therein]; that C. D. is a material witness for the plaintiff [or the defendant] for the trial of the action [or proceeding]. [Here state the facts showing the case to be one in which a deposition may be taken as provided in the code.]

[Signature of affiant.]

[Jurat.]

FORM No. 1144—Affidavit and application for commission for the taking of the deposition of a non-resident witness.

[Title of court and cause, or proceeding.]

[Venue.]

A. B., being duly sworn, says: That he is the attorney for the plaintiff [or petitioner] in the above-entitled action [or proceeding]; that C. D. is a material witness for the plaintiff [or petitioner] in said action [or proceeding], and that said witness does not reside in this state, but resides at _____, in the county of _____, in the state [or territory] of _____.

Affiant therefore asks that a commission issue out of this court to take the deposition of said witness, and that there be attached to such commission interrogatories and cross-interrogatories settled by the Hon. _____, judge of said court, on which such deposition is to be taken; that the annexed are interrogatories proposed by the plaintiff on which such deposition is to be taken.

[Signature of affiant.]

[Jurat.]

[Annex list of proposed interrogatories.]

FORM No. 1145—Notice of taking of deposition.

[Title of court and cause.]

Notice is hereby given, that the deposition of K. L., a witness in behalf of the plaintiff [or defendant] in this action [or proceeding], will be taken before M. N., a notary public [or other officer authorized to take depositions, designating], at his office in the city [or town] of _____, county of _____, in this state, commencing at o'clock _____ M., of the _____ day of _____, 19____; and, if not completed on that day, that the taking of the same will be continued thereafter, and from day to day, and over legal holidays, until such deposition is fully taken.

And you will further take notice, that the annexed is a copy of the affidavit [and order] showing that this is a proper case, and authorizing the taking of said deposition.

[Date.] [Signature of attorney for plaintiff or defendant.]

[Address to the attorney of the adverse party.]

FORM No. 1146—Commission to take deposition of witness.

[Title of court and cause, or proceeding.]

The people of the state of , to , greeting:

Whereas, it appears to the judge[s] of our court of the county of , state of , that , residing at , in the of , is a material witness in a certain action now pending in our said court, between , plaintiff, and , defendant, [or in the matter or proceeding above entitled,] we, in confidence of your prudence and fidelity, have appointed, and by these presents do appoint, you a commissioner to take the deposition of said witness, and therefore we authorize and empower you, at certain days and places, to be by you for that purpose appointed, diligently to examine said witness in answer to the interrogatories annexed to this commission, and upon his corporal oath, first taken before you, which oath you are hereby authorized to administer, and cause the said examination of the said witness to be reduced to writing and subscribed by the said witness, and then certified and returned [the same annexed to this commission] unto the clerk of our court aforesaid, with all convenient speed, enclosed in a sealed envelope directed to said clerk, and forwarded to him by United States mail or other usual channel of conveyance.

Witness the Hon. , the judge[s] of our court of the county of , and the seal of said court, at the city of , this day of , 19 .

[Seal.]

, Clerk.
By , Deputy Clerk.

FORM No. 1147—Instructions to commissioner.

1. All the commissioners named in the commission shall have notice of the time and place of executing it; and if any of them do not act, let the fact that they were notified, or could not be notified, and the reason for their not acting, be stated.

2. The commission must be executed by , the commissioner [or commissioners] named therein.

3. The acting commissioner[s] will examine the witnesses separately, after publicly administering to such the following oath or affirmation: "You do solemnly swear that the evidence you shall give in this issue, pending between and , shall be the

truth, the whole truth, and nothing but the truth; so help you God." [Or, if the witness shall declare that he has conscientious scruples against taking an oath, or swearing in any form, he shall be permitted to make affirmation according to the following form: "You do solemnly declare (or affirm)," as above.]

4. The general style or title of the depositions must be drawn up in the following manner:

"Deposition of _____, witness, produced, sworn [or affirmed], and examined, the _____ day of _____, 19____, at _____, under and by virtue of a commission issued out of the _____ court of the county of _____, state of _____, in a certain cause therein depending, and at issue between _____ plaintiff, and _____ defendant, as follows:

"A. B., of [insert his place of residence and occupation], aged _____ years and upwards, being duly and publicly sworn [or affirmed], pursuant to the directions hereto annexed, and examined on the part of the _____, doth depose and say as follows, viz.:

"1. To the first interrogatory he saith: [Insert the witness's answer.]

"2. To the second interrogatory he saith: [Give witness's answer; and so on throughout, as to the other interrogatories.]"

If he can not answer, let him say he does not know.

5. If there be any cross-interrogatories, the witness will go on thus: "First—To the first cross-interrogatory, he saith [giving answer, and so on throughout, as to other cross-interrogatories]."

6. When the witness has finished his deposition, let him subscribe it, and the acting commissioner[s] will certify as follows:

"Examination taken, reduced to writing, and by the witness subscribed and sworn to, this _____ day of _____, 19____, before _____, Commissioner[s]."

7. If any papers or exhibits are produced and proved, they must be annexed to the depositions in which they are referred to, and be subscribed by the witness, and be endorsed by the acting commissioner[s] in this manner:

"At the execution of a commission for the examination of witnesses, upon issues herein between _____, plaintiff, and _____, defendant, this paper [describe the same] was produced and shown to [insert the witness's name], and by him deposed unto at the time of his examination before _____

, Commissioner[s]."

8. The acting commissioner[s] will sign [his or their] name[s] to each half-sheet of the depositions and exhibits.

9. If an interpreter is employed, the commissioner[s] will administer to him the following oath and certify thereto:

“You do solemnly swear that you will truly and faithfully interpret the oath and interrogatories to be administered to , a witness now to be examined, out of the English language into the language; and that you will truly and faithfully interpret the answers of the said thereto, out of the said language into the English language.”

Let the deposition be subscribed by the interpreter as well as by the witness, and certified by the acting commissioner[s], as follows:

“Examination taken, reduced to writing, subscribed by the witness and by the sworn interpreter, and sworn to by the witness, this day of , 19 , before , Commissioner[s].”

10. The commissioner[s] will make return on the back of the commission by endorsement, thus:

“The execution of this commission appears in certain schedules hereunto annexed. , Commissioner[s].”

11. The depositions [and exhibits, if any] must be annexed to the commission, and then the commission, the directions, the interrogatories, cross-interrogatories, depositions, and exhibits must be folded into a packet and bound with tapes. The acting commissioner[s] to set [his or their] seal[s] at the several meetings or crossings of the tape, endorse [his or their] name[s] on the outside, and direct it thus:

To , Esq., Clerk of the court, at , state of .

12. When the commission is thus executed, made up, and directed, it must be returned in the manner specified in the direction on the commission, if there be any.

13. If there be no direction on the commission specifying the manner in which it is to be returned, then it must either be delivered to the court by , the acting commissioner[s], personally, or else be forwarded by some person coming to this place, and who must be able, on his arrival, to make oath before , the judge[s] or the clerk of the court, that he received the same from the hands of [naming him or them], the commissioner[s], and that it had not been opened or altered since he so received it.

14. In case of returning the commission by mail, it is to be deposited by , the acting commissioner[s], in the nearest post-office, [he or they] making the following endorsement thereon:

“Deposited in the post-office at , this day of , 19 , by [me or us]. , Commissioner[s].”

15. In case of returning the commission by a vessel, it is to be deposited by , acting commissioner[s], in the letter-bag of such vessel, he [they] making upon the commission the following endorsement:

“Deposited in the letter-bag of the , now lying at , and bound for the port of , this day of , 19 , by [me or us]. , Commissioner[s].”

It may also be forwarded by any usual conveyance.

The commissioner[s] [is or are] requested to be very careful to observe the foregoing instructions, as the smallest variance may vitiate the execution of the commission.

[Here may be given special or additional instructions.]

FORM No. 1148—Deposition of witness. (To be annexed to the commission.)

[Title of court and cause.]

Deposition of K. L., a witness produced and examined this day of , 19 , under and by virtue of a commission issued out of the court of the state of , in the county of , and to which this deposition is annexed, in the above-entitled action [or proceeding], pending and at issue therein between A. B., the plaintiff in said action, and C. D., the defendant therein, [or between A. B., the petitioner in said proceeding, and C. D., the respondent therein,] as follows:

K. L., of the [state his residence], aged years and upwards, being duly sworn [or affirmed], doth depose and say as follows:

1. To the first direct interrogatory [stating it] he saith: [State his answer.]

2. To the second direct interrogatory [stating it] he saith: [State his answer; and so on as to all the direct interrogatories.]

1. To the first cross-interrogatory [stating it] he saith: [State his answer.]

2. To the second cross-interrogatory [stating it] he saith: [State his answer; and so on as to all the cross-interrogatories, and redirect and re-cross interrogatories, if any.]

[Signature of witness:] K. L.

[Certificate of commissioner to deposition.]

State of , }
County of . } ss.

I, E. F., commissioner under the commission hereto annexed, do certify, that K. L., the witness, named therein, personally appeared before me on the day of , 19 , at , in the county of , in the state of , and being by me duly sworn, made answer to the several interrogatories annexed to the foregoing commission, and did depose to the matters contained in the foregoing deposition. And I further certify, that when the deposition was completed it was carefully read to K. L., said witness, and was corrected by him in each and every particular which he desired, and it was then subscribed by him; and I certify that the foregoing deposition is the deposition so corrected and subscribed by him. [And I further certify, that said witness endorsed the exhibits numbered attached to said deposition.] And I further certify, that I have subscribed my name to each half-sheet of said deposition [and to each exhibit]. And I further certify, that G. H., Esq., [or no one] appeared in behalf of the plaintiff [or petitioner], and I. J., Esq., [or no one] appeared in behalf of the defendant [or the respondent, or the contestant].

E. F., Commissioner.

§ 486. STIPULATIONS.

FORM No. 1149—Waiver of answer.

[Title of court and cause.]

It is hereby stipulated by and between the parties hereto that formal answer be and the same is waived herein, and it is further stipulated that the allegations of the complaint on file herein may for the purposes of trial be deemed denied.

[Date.]

A. B., Attorney for plaintiff.

C. D., Attorney for defendant.

FORM No. 1150—Stipulation to transfer cause to another department.

[Title of court and cause.]

Whereas, the above-entitled action was originally assigned by the Hon. , presiding judge of said court, to department No. of said court; and whereas the said judge of said department has expressed his desire, because of his present overcrowded calen-

dar, to have said cause transferred to some other department of this court [or state any other reason for the transfer];

Wherefore, the undersigned attorneys for the respective parties herein hereby stipulate and agree that said cause be transferred from said department No. , and be reassigned by the presiding judge of said court; and that all motions, demurrers, and other matters now pending in said cause be heard in the department to which the same shall be so assigned hereunder, and that said cause be determined therein, subject to such further order or orders of the court as may be made.

[Date.]

A. B., Attorney for plaintiff.

C. D., Attorney for defendant.

FORM No. 1151—Stipulation to dismiss appeal.

[Title of court and cause.]

It is stipulated in the above-entitled action, that the appeal taken by defendants, , to the supreme court of the state of , from the judgment and decree of the court of the state of , in and for the county of , made and entered in said court on , 19 , in favor of plaintiff in said action, and against the appealing defendants, is hereby dismissed, and that a motion for an order dismissing said appeal may be made and heard in the said supreme court at any time without notice, upon presentation of this stipulation; and that plaintiff waives any claim for costs incurred by him upon such appeal:

It is further stipulated, that upon the making of the order of said court dismissing said appeal, the clerk of the supreme court may enter such dismissal forthwith, and that a remittitur may issue thereon forthwith, and be sent to the clerk of said court, and that upon the filing of said remittitur in the office of the county clerk of County, plaintiff will thereupon file a duly executed satisfaction of judgment entered in his favor in said action for his costs incurred in said action in said court.

[Date.]

A. B., Attorney for plaintiff.

C. D., Attorney for defendants.

FORM No. 1152—Stipulation as to facts.

(In County of Saguache v. Decker, 10 Colo. 149; 14 Pac. 123.)

[Title of court and cause.]

The parties hereto agree upon the following statement of facts,

and submit the same to the court for the determination of the points in controversy hereinafter specified. The points agreed upon are as follows: [Here follows statement of facts.]

The points in controversy, and upon which the decision of the court is asked, are as follows: The foregoing bills have been contracted by a duly appointed and organized board of health within the county of Saguache, when said board of health was the board of health of an incorporated town. Is or is not the county liable therefor?

[Date.]

[Signatures of parties.]

FORM No. 1153—Stipulation to restore and file original complaint destroyed by fire.

(In *Athearn v. Ryan*, 154 Cal. 554; 98 Pac. 390.)

[Title of court and cause.]

It is hereby stipulated and agreed, that the foregoing and annexed copy of complaint is a true and correct copy of the original complaint filed in the superior court of the city and county of San Francisco, state of California, in the action entitled Charles H. Athearn, plaintiff, v. Annie Ryan, defendant, on or about the 5th day of October, 1905.

It is also stipulated and agreed, that said copy of said complaint be filed in said court as of the 5th day of October, 1905, in the place and stead of said original, which was destroyed by fire on or about the 18th day of April, 1906.

Benjamin Healey,
Attorney for defendant.
Garoutte & Goodwin,
Attorneys for plaintiff.

§ 487. ANNOTATIONS.

A stipulation by a party, represented in the action by an attorney of record, will have no effect, and will be disregarded by the court: *Wylie v. Sierra G. Co.*, 120 Cal. 485, 487, 52 Pac. Rep. 809. See *Board of Commissioners v. Younger*, 29 Cal. 147, 87 Am. Dec. 164; *Mott v. Foster*, 45 Cal. 72.

Affidavit as basis of jurisdiction.—The court's jurisdiction over the defendant to make service by publication depends upon a valid affidavit filed as provided by the code; and where there is no such affidavit, a decree based upon such proceedings is a nullity. But the mere omission of the officer attesting it to complete the affidavit, by attaching his certificate or jurat to such paper, may be supplied, and the defect remedied, where in fact the affiant had taken the oath, and it is competent to show in such case by parol that the affidavit for constructive service was accordingly sworn to by the affiant before the clerk of the court: *Bantley v. Finney*, 43 Neb. 794, 62 N. W. 214.

Error in signing.—That an oath or an affidavit does not lose its vitality because of the omission of the clerk to certify or attach his jurat, see, also, *Kruse v. Wilson*, 79 Ill. 233; *Tallman v. Ely*, 6 Wis. 244; *Jamison v. Weaver*, 84 Iowa 611, 51 N. W. 65.

So it has been held that where a party had made an affidavit, and had sworn to it before an officer authorized to administer oaths, but had not signed the affidavit, that the action was good, and that it is not necessary to the making of a good affidavit that the party making it should actually sign it: *Bates v. Robinson*, 8 Iowa 318. See *Harris v. Lester*, 80 Ill. 307; *Shelton v. Berry*, 19 Tex. 154, 70 Am. Dec. 326; *Garrard v. Hitsman*, 16 N. J. L. 124. Compare *Hargadine v. Van Horn*, 72 Mo. 370, where a contrary doctrine is supported by a divided court.

CHAPTER CXXXVIII.

Inspection of Writings and Bill of Particulars.

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| Form No. 1154. Notice of motion for an order for inspection of a paper [or account, or entries], and for a copy thereof | 1850 |
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FORM No. 1154—Notice of motion for an order for inspection of a paper [or account, or entries], and for a copy thereof.

[Title of court and cause.]
To A. B., Attorney for plaintiff [or defendant]:
Please take notice, that the defendant [or plaintiff] will move said court at the courtroom, department No. thereof, on the day of , 19 , at o'clock M., or as soon thereafter as counsel can be heard, for an order requiring plaintiff [or defendant] to give to defendant [or plaintiff] inspection of a paper [or accounts, or entries] described as follows: [Here describe]; which said paper [or accounts, or entries] relates to transactions mentioned in the complaint [or cross-complaint] in this action, and which contains evidence relating to the defense against the complaint [or cross-complaint] herein. Said motion will be based on the complaint in this action, and on the affidavit of , a copy of which is annexed hereto and served herewith, and on the ground

that such inspection and copy are necessary for the proper defense of the defendant [or plaintiff] to the complaint [or cross-complaint] herein.

[Date.]

C. D., Attorney for defendant.

**FORM No. 1155—Affidavit for order for inspection of account [or of a paper],
and to take a copy thereof.**

[Title of court and cause.]

[Venue.]

, being duly sworn, says: That he is the attorney for the defendant [or plaintiff] in this action; that plaintiff [or defendant] has in his possession [or under his control] a book [or document, describing it] relating to the transactions alleged in the complaint [or cross-complaint] in this action, and which contains evidence relating to the defense in the action [or to the defense against said cross-complaint]; that request has been made of the plaintiff [or defendant] to give inspection of such entries in said book [or of said document] and for permission to take a copy thereof, unless plaintiff [or defendant] would give him inspection and a copy thereof; that plaintiff [or defendant] refused to give or allow defendant [or plaintiff] such inspection and copy, and has refused to give permission to take such copy.

[Signature.]

[Jurat.]

[Add, where required by statute, affidavit of merits.]

FORM No. 1156—Demand to have inspection of an original instrument.

[Title of court and cause.]

To A. B., Attorney for plaintiff [or cross-complainant]:

Demand is hereby made for an inspection of the original paper [describing it], a copy of which purports to be contained [or is annexed to] the complaint [or cross-complaint] in this action. Said inspection is desired for the purpose of controverting the genuineness and due execution of said purported instrument. [Or state any other purpose of the inspection.]

[Date.] C. D., Attorney for defendant [or cross-defendant.]

FORM No. 1157—Demand for a copy of an account.

[Title of court and cause.]

To A. B., Attorney for plaintiff: The defendant in this action hereby demands a copy of the account sued on herein.

[Date.]

C. D., Attorney for defendant.

FORM No. 1158—Order directing party to furnish bill of particulars.

[Title of court and cause.]

[After recitals as to the papers filed upon which the motion is made, hearing, etc.:]

It is ordered, that the herein deliver to the herein, on or before the day of , 19 , a bill of particulars as to

. It is further ordered, that on the trial of this action the be precluded from giving any evidence respecting beyond that which may be specified in the bill of particulars above ordered. It is further ordered, that the proceedings in this action on the part of , be stayed until compliance with this order, and that

days' further time be given in which to answer [or reply] herein, after the delivery to him of said bill of particulars. [Or state a definite day.]

S. T., Judge.

Form of bill of particulars in an action upon a promissory note: *Blshop v. McHenry*, 4 Kan. App. 525, 44 Pac. 1016.

§ 488. ANNOTATIONS.—Inspection of writings and bill of particulars.**1-3. Purpose of bill of particulars.****4. Demand for bill by defendant.****5. Failure to file upon demand.—Effect of.****6. Motion to make bill more specific.****7. Time to answer extended by motion.****8. Failure to deliver bill within statutory time.—Discretion of court.**

1. The purpose of a bill of particulars is to apprise a party of specific demand of his adversary: *Auzerais v. Naglee*, 74 Cal. 60, 64, 15 Pac. 371. See *Ferry v. King Co.*, 2 Wash. 337, 26 Pac. 537, 538.

2. The chief office of a bill of particulars is to amplify the pleading and more minutely specify the claim or defense set up. It does not set forth cause of action or ground of defense: *Blackburn v. Washington, G. M. Co.*, 19 Wash. 361, 53 Pac. 369, 370.

3. A bill of particulars makes the plaintiff's demand more specific, and limits his proof to items set out: *Edelman v. McDonell*, 126 Cal. 210, 213, 58 Pac. 528.

4. Demand for bill by defendant.—A bill of particulars may be demanded by the defendant if the cause of the action is not set out in the complaint with sufficient fulness: *Knowles v. Sandercock*, 107 Cal. 629, 641, 40 Pac. 1047.

5. Failure to file upon demand.—Effect of.—A failure to file a bill of particulars after demand rendered it error to receive evidence of any item of account: *Scott v. Frost*, 4 Colo. App. 557, 36 Pac. 910.

6. Motion to make bill more specific.—As to what extent a bill of particulars may go into details, when required, is largely a matter of discretion with

the trial court. Such court does not abuse its discretion when it denies a motion of the defendant in which he asks that the plaintiff be required to make items in the bill of particulars submitted more specific for the purpose of furnishing the defendants evidence or the names of witnesses for his defense: *Bellingham v. Linck*, 53 Wash. 208, 101 Pac. 843, 844, citing, as to the office of the bill of particulars, *Blackburn v. Washington G. M. Co.*, 19 Wash. 361, 53 Pac. 369; *Ingram v. Wishkah Boom Co.*, 35 Wash. 191, 77 Pac. 34; and as to the discretion of the court in denying motion to make bill of particulars more specific, *Ferry v. King Co.*, 2 Wash. 337, 343, 26 Pac. 537; *Turner v. Great Northern R. Co.*, 15 Wash. 213, 217, 46 Pac. 243, 55 Am. St. Rep. 883.

7. Time to answer extended by motion.—Effect of filing a motion for a bill of

particulars is ipso facto to extend the time for answering: *Plummer v. Well*, 15 Wash. 427, 46 Pac. 648, 649.

8. Failure to deliver bill within statutory time.—Discretion of the court.—A failure to deliver a bill of particulars within a statutory time does not give the defendant the absolute right to have the evidence offered at the trial rejected. It is within the discretion of the court to determine whether the penalty of the statute should be enforced and the evidence excluded; and hence, where a bill of particulars has been furnished long prior to the trial, though not within the statutory five days, it was not error for the court to admit such evidence: *McCarthy v. Mt. Tecarte L. & W. Co.*, 110 Cal. 687, 692, 43 Pac. 391; *Silva v. Bair*, 141 Cal. 599, 601, 75 Pac. 162. See *Robbins v. Butler*, 13 Colo. 496, 22 Pac. 803.

CHAPTER CXXXIX.

Trials, Witnesses, and Proceedings for Contempt.

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§ 489. TRIALS.

FORM No. 1159—Order for drawing trial jury.

[Title of court and cause.]

In the matter of drawing a trial jury:

It appearing that the business of this court will require the attendance of a trial jury for the trial of criminal cases, and civil actions in which jury trials shall have been demanded, and no jury being in attendance, it is now, by the court, ordered that a trial jury be immediately drawn and summoned to attend before this court in department No. thereof, on the day of , 19 , at o'clock M., and that the number so drawn be [here giving the number].

Done in open court, this day of , 19 .

[Filing endorsement.]

S. T., Superior Judge.

FORM No. 1160—Venire.

[Title of court and cause.]

The people of the state of , to the sheriff of the county of , greeting:

You are hereby commanded to summon good and lawful men from the body of the county, and not from the bystanders, legally qualified citizens of said county, to serve as [trial] jurors, in the superior court, and that they be and appear at the courtroom thereof, on , the day of , 19 , at o'clock M.

Witness the Honorable the Judges of the Superior Court and the seal thereof, this day of , 19 .

[Attest:

, Clerk.

[Seal.]

By

, Deputy Clerk.

[Filing endorsement]

FORM No. 1161—Notice of motion for trial of special issues by jury.

[Title of court and cause.]

To A. B., Attorney for plaintiff [or defendant] :

Take notice, that upon the pleadings and proceedings in the above-entitled action, and upon the affidavits, with copies of which you are herewith served, a motion will be made at [stating time and place] upon the opening of the court, or as soon thereafter as counsel can be heard, that the special issues [or questions of fact involved] in the above-entitled action, as said special issues [or questions of fact] are stated in schedule A, hereto annexed, be submitted to a jury for trial, and for such or further relief as to the court may seem proper.

[Date.]

C. D., Attorney for defendant [or plaintiff].

[Statement of special issues.]

Schedule A. [Annexed to foregoing notice.]

The following special issues [or questions of fact] are proposed to be submitted to a jury for trial in the above-entitled action, as mentioned in the foregoing notice, to wit:

1. Whether [stating a specific issue under the pleadings].
2. Whether [etc.].

FORM No. 1162—Order for trial of special issues by jury.

[Title of court and cause.]

On reading and filing the affidavit of _____, attorney for the plaintiff [or defendant] in the above-entitled action, showing that this action is at issue upon the complaint and answer therein, and on reading and filing a notice of motion on the part of the plaintiff [or defendant] herein for an issue or issues in this cause to be tried by a jury, with proof of due service of said affidavit and notice of motion on _____, attorney for the defendant [or plaintiff], and on reading [specify other papers read], and after hearing [etc.; or no one appearing in opposition] :

It is hereby ordered, that the following special issues of fact arising upon the pleadings in this action be tried by a jury at the court, in and for the county of _____, to wit:

1. [Stating the question to be tried, e. g.] Whether the defendant executed the note and mortgage mentioned in the complaint in this action.

2. [Stating question to be tried, e. g.] Whether the plaintiff

executed the release of the said note and mortgage, as stated in the answer.

And that the plaintiff hold the affirmative upon the first question, and the defendant the affirmative upon the second question; that the issue between the plaintiff and the defendant be [stating issue, e. g.] whether the release of the lands of the said defendant from the lien of the mortgage mentioned in the complaint of the plaintiff was obtained by the defendant by duress and fraud, or either, as alleged in the reply [or complaint]; and that the plaintiff be considered as holding the affirmative of the last-mentioned issue upon the trial thereof.

[Date.]

S. T., Judge.

FORM No. 1163—Minutes and certificate of drawing jury.

[Title of court and cause.]

Be it remembered, that, in pursuance of an order made by the Hon. _____, judge of the superior court, department No. _____, in and for the county and state aforesaid, on the _____ day of _____, 19____, ordering me to draw from the jury-box containing the names of persons selected by the board of supervisors of said county to serve as _____ jurors for the year 19____, slips of paper containing the names of persons to form a jury to serve until discharged:

We _____, judges of the superior court, departments No. _____ and No. _____, and _____, clerk of said court, and _____, sheriff of said county, did, in open court, on _____, the _____ day of _____, 19____, at the hour of _____ o'clock _____ M. of said day, after duly shaking the jury-box, and in the presence of the court, draw therefrom _____ slips of paper containing the names of the following persons written thereon to serve as said _____ jury, to wit:

| No. | Number of Ballot. | Name. | Residence. | Occupation. |
|-----|-------------------|-------|------------|-------------|
| | | | | |

[Following with the names, etc., of as many as may be drawn.]

The people of the state of _____ to _____, greeting:
You are hereby commanded to summon the above-named citizens of said county to serve as _____ jurors in the superior court,

department No. , and that they be and appear at the court-room thereof on , the day of , 19 , at o'clock M.

In witness whereof, we have hereunto set our hands, this day of , 19 .

S. T., Judge of Superior Court.

[Seal.]

, County Clerk.

By

, Deputy Clerk.

[Filing endorsement.]

FORM No. 1164—Order consolidating causes for purposes of trial.

(In Scheerer & Co. v. Deming, 154 Cal. 138; 97 Pac. 155.)

[Title of court and consolidated causes.]

Upon the stipulation on file in this case, and upon the motion of R. L. Horton, attorney for defendant Allen D. Butt, and good cause appearing therefor:

It is hereby ordered, that the following cases be and the same are hereby consolidated and transferred to department No. 3 of said court, for the purpose of trial, and that all of said causes shall be heard and tried together, upon the date that the first of either of said causes shall be set for trial, to wit: [Here follow titles and numbers of cases included in the order.]

Dated June 17, 1905.

Waldo M. York,

Judge of Superior Court.

FORM No. 1165—Authorization to attorney to compromise pending action.

Know all men by these presents, that I, A. B., of , state of , the party of the first part, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, E. F., party of the second part hereto, my true and lawful attorney, for me and in my name, place, and stead, to agree upon, consummate, compromise, and settle that certain action now pending in the court of , county of , state of , No. , and entitled A. B., plaintiff, v. C. D., defendant; and I hereby authorize the party of the second part, as my said attorney, to receive and receipt for any and all amounts in my name, place, and stead, upon any compromise or settlement of said action which may be agreed upon by my said attorney and the defendant, and to execute all acquittances, receipts, and releases to a complete settlement of said action, and upon settlement thereof to dismiss the same

or any other action for the same cause which in his judgment may be deemed necessary or expedient to be brought for the settlement and adjustment of the demand made therein.

Giving and granting unto my said attorney the authority to do any and all of said acts as effectually as I might do if personally present, hereby confirming all acts hereunder done and performed or to be done and performed in the premises.

In witness whereof, I have hereunto subscribed my name, this
day of , 19 . A. B.

Witnesses:

[Or acknowledgment, as required.]

FORM No. 1166—Verdict.

(From the record in *Schneider v. Railway Co.*, 134 Cal. 482; 66 Pac. 734.)

[Title of court and cause.]

In open court, April 12, 1900.

We, the jury in the above-entitled case, find a verdict in favor of the plaintiff in the sum of \$5,000.

[Endorsement of filing.]

Charles C. Levey, Foreman.

§ 490. WITNESSES, AND PROCEEDINGS FOR CONTEMPT.

FORM No. 1167—Civil subpoena.

[Title of court and cause.]

The people of the state of send greeting to :

We command you, that, all and singular business and excuses being set aside, you appear and attend the superior court of the county of , state of , at a session of said court, to be held at the courthouse in the city of , on , the day of , 19 , at o'clock M., then and there to testify in a certain case now pending in said court, then and there to be tried, between plaintiff and defendant, on the part of the plaintiff [or defendant, as the case may be].

And for a failure to attend you will be deemed guilty of a contempt of court, and liable to pay all loss and damages sustained thereby to the party aggrieved.

Given under my hand, this day of , 19 .

[Seal.]

By , County Clerk.
Deputy Clerk.

FORM No. 1168—Attachment against a witness for not obeying a subpoena.

The people of the state of , to the sheriff of the county of :

We command you to attach , and bring him forthwith [or on the day of , 19 ,] personally before our court [or, if on a certain term, naming it], held in and for our county of [or before , referee in the action hereafter mentioned], at , to answer to us for certain contempts against us, in not obeying our writ of subpoena, commanding him to appear on the day of , 19 , before the said court [or other court, or referee], to testify in an action there to be tried between , plaintiff, and , defendant; and you are further commanded to detain said in your custody until he shall be discharged by our said court [or by said referee]. And have you then and there this writ.

Witness the Hon. , justice [or judge] of said court, at , on the day of , 19 .

[Seal.] , Clerk.

[Endorsed:] Allowed this day of , 19 .
S. T., Justice [or Judge] of Court.

FORM No. 1169—Attachment for defaulting.

[Title of court and cause.]

The people of the state of , to the sheriff of the county of , greeting:

You are hereby commanded forthwith to attach the body of , and bring him before the superior court, to answer for a contempt of said court, in failing to appear as in the above-entitled cause, as per mandate of this court.

Witness the Hon. , judge of the said superior court, this day of , 19 .

[Seal.] By , County Clerk.
, Deputy Clerk.

FORM No. 1170—Affidavit in proceedings for punishing a contempt of court.
(Common form.)

[Title of court and cause.]

[Venue.]

A. B., being duly sworn, says: That on the day of , 19 , a judgment of a perpetual injunction [or other restraining judgment or order] was rendered and entered against C. D. in an action in the court of the state of , in the county of , in which this affiant, A. B., is plaintiff, and the said C. D. is defendant; that said injunction [or order], among other things, enjoined said C. D., the defendant in that action, from [stating the acts which said injunction enjoined said C. D. from doing]; that a copy of said injunction, certified to by the clerk of said court, was served on said C. D. at the county of , in the state of , on the day of , 19 , and he then had, and ever since has had, knowledge and notice of said injunction; that said judgment has not been appealed from, reversed, or set aside, and is in full force and effect; that after said service, to wit, on the day of , 19 , said C. D. did [stating the acts constituting the contempt], in disobedience to the commands of said injunction, and therefore this affiant charges said C. D. with a contempt of this court.

[Jurat.]

[Affiant's signature.]

FORM No. 1171—Affidavit in proceedings for contempt.—Action at law to prevent usurpation of office.

(In State ex rel. Mahoney v. McKinnon, 8 Ore. 487.)¹

State of Oregon, }
County of Douglass. } ss.

I, William R. Willis, being duly sworn, say: I am an attorney for plaintiff above-named; that plaintiff did, on the 25th day of June, 1879, recover judgment in the above-entitled court and cause against the defendants, J. H. Shupe and E. J. Page; that [thereby] they were [adjudged] guilty of usurping and unlawfully exercising the office of trustees of the city of Oakland, and [it was therein further ordered] that they be excluded therefrom; * * * that the said defendants

¹ The affidavit and the motion set forth in forms Nos. 1171 and 1172 were held sufficient as a basis for an order to the defendants to show cause. It is not improper for the attorney to make the affidavit upon which the proceedings for contempt may be instituted where the statute provides that any person having knowledge of the facts is competent to make such affidavit: State ex rel. Mahoney v. McKinnon, 8 Ore. 487, 491, citing section 643 of the Oregon Civil Code.

[and each of them], in disobedience of said lawful judgment, continue to and do now usurp and exercise the office of trustees of said city of Oakland, refusing and neglecting obedience to said judgment.¹

[Jurat.] William R. Willis.

FORM No. 1172—Motion for warrant of arrest in proceedings for contempt in neglecting and refusing to obey a judgment.

(In State ex rel. Mahoney v. McKinnon, 8 Ore. 487.)

[Title of court and cause.]

Now comes the plaintiff above named, and moves the Hon. H. F. Watson, judge of the above-entitled court, upon the foregoing affidavit, for a warrant of arrest against the said defendants, E. J. Page and J. H. Shupe, to answer for contempt in neglecting and refusing to obey the judgment described in said affidavit.

William R. Willis, Plaintiff's attorney.

FORM No. 1173—Order to show cause, made on the filing of affidavit charging contempt.

[Title of court and cause.]

Upon reading and filing the affidavit of A. B., charging and showing that C. D. has disobeyed the commands of a judgment of injunction [or other restraining judgment or order] rendered and entered in the court of the state of , in an action therein in which said A. B. is plaintiff and said C. D. is defendant:

It is ordered, that the said C. D., show cause before said court at the courtroom thereof, on [stating the time], why he should not be punished for a contempt of said court for such disobedience. It is further ordered, that this order be served on said C. D. by delivering to him personally a certified copy thereof, with a copy of said affidavit of A. B. thereto attached, at least days before the date of the hearing of said order to show cause.

[Date.] S. T., Judge.

FORM No. 1174—Warrant of attachment to be issued in proceedings to punish for a contempt of court.

[Title of court and cause.]

It appearing from the affidavit of A. B., filed on the day of , 19 , that C. D. has disobeyed the commands of the injunction [or order] in the judgment rendered and entered on the

¹ This last averment in the original was upon information and belief.

day of , 19 , in an action in said court of the state of , in the county of , in which said A. B. is plaintiff and said C. D. is defendant, and that said C. D. was personally served with a copy of said judgment and injunction [or order] on the day of , 19 , and that said C. D., after he was so served with said copy, and knew of said judgment and injunction [or order], wilfully disobeyed the commands of said injunction [or order], and is thereby guilty of a contempt of the court:

Now, therefore, it is ordered, that a warrant of attachment be issued to bring said C. D. before this court on [stating the time], then and there to answer the charge of contempt contained in said affidavit. And it is further ordered, that a copy of said affidavit be served on said C. D. at the time he is arrested under such warrant of attachment.

[Date.]

S. T., Judge.

**FORM No. 1175—Recitals and judgment for a contempt of court committed
in the presence of the court.**

[Title of court and cause.]

Whereas, during the trial of the above-entitled action in this court, before a jury, A. B., Esq., was attorney for the plaintiff, and C. D., Esq., was attorney for the defendant, and during the progress of the trial of said action the said A. B., who was the attorney for plaintiff, on the day of , 19 , in the presence of the court, and in the presence of the jury before whom said action was being tried, struck said C. D. a violent blow with a cane [or state the fact as it may be]; and whereas, said misconduct on the part of said A. B. tended to and did interrupt the due course of said trial:

Wherefore, the court finds that said A. B. is guilty of a contempt of this court; and it is adjudged that he be punished for such contempt by a fine of \$ [or state any other penalty imposed].

Done in open court, this day of , 19 .

S. T., Judge.

**FORM No. 1176—Judgment in a proceeding for a contempt of court against
a witness for refusing to answer a relevant and material
question.**

[Title of court and cause.]

It appearing to the court, that in the above-entitled action, while the same was regularly on for trial in this court, at the courtroom

thereof, on the day of , 19 , one F. G. was duly sworn as a witness, and was being examined as a witness; that A. B., the attorney for the plaintiff in the action, asked said F. G., as such witness in the action, this question: [State the question]; that such question was and is material and relevant under the issues in the action; that said F. G., said witness, thereupon declined to answer said question, notwithstanding he was then and there ordered by the court to answer the same; that said F. G. thereupon refused, and still refuses, to answer said question:

Wherefore, the court finds that because thereof said F. G. is guilty of a contempt of this court; and it is adjudged that the said F. G. be punished for such contempt by imprisonment in the county jail of the county of , in this state, until he consents to answer such question.

Done in open court, this day of , 19 .

S. T., Judge.

§ 491. ANNOTATIONS.—Trials, witnesses, and proceedings for contempt.

1. Trials.—Admissions in pleadings.
2. Unnecessary averments need not be proved.
3. Objections on motion stated in the conjunctive.
4. Abstract instruction.—When prejudicial.
5. Rule as to abstract instruction not an inflexible one.
6. Erroneous instruction.—When not prejudicial.
7. Not error to refuse incorrect charge.
8. Repetitions in charges properly refused.
9. Plea in abatement amounting to general denial.—Trial.
- 10, 11. Exceptions.
12. Repetition of exceptions upon trial.
13. Matters of record properly have no place in a bill of exceptions.
14. Discretionary authority of courts of equity to consolidate causes.
15. Effect of consolidation.
16. Effect as to issues and pleadings.
17. Single or separate judgments.—Reference.
18. Witnesses and contempts.—Statutes applicable to proceedings.
19. Jurisdiction to punish for contempt.
- 20, 21. Judges at chambers.
- 22, 23. Proceeding in vacation.
- 24-26. United States commissioner.
27. Disobedience by judge of writs of supersedeas of higher court.
28. Application to punish for contempt.
29. State as party.
30. Affidavit, where required, is jurisdictional.
- 31, 32. Affidavit upon information and belief.
33. Omission cured by answer.
- 34-36. Judgment must specify the contempt.
37. Refusing to answer question.—Recital in commitment.
- 38, 39. Defenses.
40. Appealability of order.

1. TRIALS.—Admissions in pleadings. are not required to be proved as facts
—Admissions contained in the pleadings in the case. The pleadings in a case

are before the court, and constitute a part of the proceedings without being introduced in evidence: *Knowles v. New Sweden I. Dist.*, 16 Idaho 217, 101 Pac. 81, 85; *Bloomington v. DuRell*, 1 Idaho 33; *East Tennessee etc. Co. v. Kane*, 92 Ga. 187, 18 S. E. 18, 22 L. R. A. 315.

2. Unnecessary averments need not be proved: *Luttermann v. Romey* (Iowa), 121 N. W. 1040, 1041, citing Iowa code § 3639; *Knapp v. Cowell*, 77 Iowa 528, 42 N. W. 434.

3. Objections on motion stated in the conjunctive.—On a motion to strike out evidence on several grounds stated in the conjunctive, it is not the law that the motion must be denied unless all the objections are well based: *United States Oil etc. Co. v. Bell*, 153 Cal. 781, 788, 96 Pac. 901 (to quiet title, and cross-complaint to rescind and annul deed).

4. Abstract instruction.—When prejudicial.—It is prejudicial error to give an abstract instruction which might be construed as an intimation from the court that there was some evidence on that issue when there was in fact none: *C. H. Smith etc. Co. v. Weatherford* (Ark.), 121 S. W. 943, 945; *St. Louis etc. R. Co. v. Townsend*, 69 Ark. 380, 63 S. W. 994; *St. Louis etc. R. Co. v. Woodward*, 70 Ark. 441, 69 S. W. 5; *Harris L. Co. v. Morris*, 80 Ark. 260, 96 S. W. 1067; *Fordyce v. Key*, 74 Ark. 19, 84 S. W. 797; *Arkansas etc. R. Co. v. Stroude*, 77 Ark. 109, 91 S. W. 18, 113 Am. St. Rep. 180.

5. Rule as to abstract instruction not an inflexible one.—The rule that the court should not instruct in such a manner as to intimate that there is evidence upon some issue where no evidence exists is not an inflexible one; for example, where it can be seen that no prejudice could have resulted from the giving of such an instruction, the verdict will not be set aside: *C. H. Smith etc. Co. v. Weatherford* (Ark.), 121 S. W. 943, 946; *Miller v. Nuckolls*, 77 Ark. 64, 91 S. W. 759, 4 L. R. A. (N. S.) 149, 113 Am. St. Rep. 122, 7 Am. & Eng. Ann. Cas. 110; *Jonesboro etc. R. Co. v. Cable*, 89 Ark. 518, 117 S. W. 550.

6. Erroneous instruction.—When not prejudicial.—The appellant can not complain of an error in instructions asked by his opponent if the same error was repeated in instructions asked by him-

self: *Chicago R. I. & P. Co. v. Smith* (Ark.), 127 S. W. 715, 717, citing *St. Louis etc. R. Co. v. Carter*, 126 S. W. 99, and other cases.

7. Not error to refuse incorrect charge.—A charge to the jury should be correct in every particular; otherwise, a party can not complain of a refusal to give it: *C. H. Smith etc. Co. v. Weatherford* (Ark.), 121 S. W. 943, 946.

8. Repetitions in charges properly refused.—A charge to the jury which is a repetition in substance of other charges given may be properly refused: *St. Louis etc. R. Co. v. Wilcox* (Tex. Civ. App.), 121 S. W. 588, 590; *McCray v. Galveston etc. R. Co.*, 89 Tex. 168, 34 S. W. 95.

9. Plea in abatement amounting to general denial.—Trial.—Matters set up in a so-called "plea in abatement" which amount to nothing more than a general denial do not warrant a trial of such matters separate and apart from the trial on the merits: *Union Loan etc. Co. v. Farbestein* (Mo. App.), 127 S. W. 656, 659.

10. Exceptions.—The object of a bill of exceptions is to make that a part of the record which is not already a part of it: *Ewing v. Vernon County*, 216 Mo. 681, 116 S. W. 518, 519.

11. Under section 647 of the Code of Civil Procedure of California, an exception is allowed without especially reserving the same, among other things, from "an order or decision from which an appeal may be taken," etc. Under section 939 of the same code, an appeal may be taken, among other things, from "an order granting or refusing a new trial." Hence, where the law, as in California, allows an exception to a ruling upon a motion for a new trial, it is not necessary to especially reserve the exception inasmuch as the order is deemed excepted to.

12. Repetition of exceptions upon the trial.—When upon the first appearance of improper testimony the counsel raises his objection, and the same is overruled, he is not required to continually interpose a like objection to all similar testimony: *McKee v. Rudd*, 222 Mo. 344, 121 S. W. 312, 320, 133 Am. St. Rep. 529.

13. Matters of record properly have no place in a bill of exceptions, and such recitals therein add nothing to the validity of the bill: *Flanagan Mill Co. v. City of St. Louis*, 222 Mo. 306, 121 S. W. 112; *Hogan v. Hinchey*, 195 Mo. 527, 533, 94 S. W. 522; *Harding v. Bedoll*, 202 Mo.

625, 100 S. W. 638; *Groves v. Terry*, 219 Mo. 596, 117 S. W. 1167; *Shemwell v. McKinney*, 214 Mo. 692; 114 S. W. 1083; *Stark v. Zehnder*, 204 Mo. 442, 102 S. W. 992; *Walser v. Wear*, 128 Mo. 652, 81 S. W. 37; *Pennowsky v. Coerver*, 205 Mo. 135, 103 S. W. 542; *Coleman v. Roberts*, 214 Mo. 634, 114 S. W. 39; *Southern Missouri etc. R. Co. v. Wyatt*, 223 Mo. 347, 122 S. W. 688, 689.

14. **Discretionary authority of courts of equity to consolidate causes.**—Courts of equity are vested with discretionary powers to consolidate causes, and such discretion will not be reviewed on appeal except for abuse: *Hayward v. Mason*, 54 Wash. 649, 104 Pac. 141, 142. See *Peterson v. Dillon*, 27 Wash. 78, 67 Pac. 897.

15. **Effect of consolidation.**—Under the statute, a consolidation of actions merges all the actions into one suit. There may be many causes of action, but the effect is to join them all in one suit. There can be therefore but one judgment in a consolidated suit, and this judgment must settle all the issues involved. Where an order to consolidate is made, the court should require the pleadings to be reconstructed as in one suit, if necessary, and should determine what costs, if any, should be charged to each party in the original suits. If the pleadings are ordered reformed, the complaint in the consolidated suit should state all of the plaintiff's cause of action against the defendants in each of the suits consolidated, and the answer of the defendants should present all issues raised in the original suits. The complaint in the consolidated suit should be the same as if the plaintiff had joined all causes of action alleged in the original suits in one action: *Handley v. Sprinkle*, 31 Mont. 57, 77 Pac. 296, 3 Am. and Eng. Ann. Cas. 531.

16. **Effect as to issues and pleadings.**—Consolidation of causes for the purposes of trial does not change the issues in the respective cases, nor render the admissions of the pleadings ineffectual when applied to the particular case in which such admissions are made: *Los Angeles Pressed Brick Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420.

17. **Single or separate judgments.**—**Reference.**—As to when there should be single or separate judgments on consolidation of causes, see note to *Hand-*

ley v. Sprinkle, 31 Mont. 57, 77 Pac. 296, 3 Am. and Eng. Ann. Cas. 534.

18. **WITNESSES AND CONTEMPTS.**—**Statutes applicable to proceedings.**—Civil statutes rather than criminal statutes relating to new trials apply to contempt proceedings: *State v. Stevenson*, 104 Iowa 50, 73 N. W. 360.

19. **Jurisdiction to punish for contempt** may be concurrent with or independent of the power of the courts to punish the act as an indictable offense: *Fisher v. McDaniel*, 9 Wyo. 457, 64 Pac. 1056, 87 Am. St. Rep. 971.

20. **Judges at chambers** may not, under the Kansas statute (Laws 1897, ch. 106), punish for contempt. Orders must be made by the court: *In re Barnhouse*, 60 Kan. 849, 58 Pac. 480.

21. Under some jurisdictions, the judge at chambers in vacation is vested with power, under certain circumstances, to punish for contempt: *State v. Loud*, 24 Mont. 428, 62 Pac. 497.

22. A proceeding in vacation adjudging a contempt is void under the Texas practice: *Ex parte Ellis*, 37 Tex. Cr. Rep. 539, 40 S. W. 275, 66 Am. St. Rep. 831.

23. The power to punish for contempt is, under the statute, generally restricted to the court in which the contempt arose: *Nebraska Children's H. Soc. v. State*, 57 Neb. 765, 78 N. W. 267.

24. The United States commissioner is an officer of the federal court which appoints him, and the power to punish for contempts before such commissioner therefore resides in the court, and not in the commissioner: *United States v. Beavers*, 125 Fed. 778.

25. The district court may punish for contempt upon its commissioner's findings: *Mau v. Stoner*, 12 Wyo. 478, 76 Pac. 584.

26. A writ of prohibition will lie to prevent an arrest for contempt by a commissioner of the supreme court: *People v. Carrington*, 5 Utah 531, 17 Pac. 735.

27. **Disobedience by judge of writs of supersedeas of higher court.**—Where a judge of a district court for one of the districts of Alaska wrote letters and committed wilful and overt acts which had the direct effect of interfering with and obstructing the effectual execution of writs of supersedeas on appeal issued by the circuit court of appeals, and directed to such district judge and to

the court over which he presided; held, that such acts constituted a contempt of the circuit court of appeals: *In re Noyes*, (*In re Wood*, *In re Geary*, *In re Frost*), 121 Fed. 209, 57 C. C. A. 445.

28. Application to punish for contempt should be made in the case in which the contempt was committed rather than in an independent proceeding instituted in the name of the state: *Ferguson v. Wheeler*, 126 Iowa 111, 101 N. W. 638.

29. State as party.—Under some jurisdictions proceedings to punish for contempt are instituted in the name of the people: *Hughes v. Territory (Ariz.)*, 85 Pac. 1058, 6 L. R. A. (N. S.) 572; *Kanter v. Clerk of Circuit Court*, 108 Ill. App. 287. And in the Oregon procedure, an amendment in civil contempt proceedings begun by a private party may be allowed, so as to substitute the state as party on relation of the private party interested: *State v. Downing*, 40 Ore. 309, 66 Pac. 917, construing Hill's Ann. Laws § 101.

30. The affidavit, where required, is jurisdictional in contempt proceedings: *Herdman v. State*, 54 Neb. 626, 74 N. W. 1097. See *In re Coulter*, 25 Wash. 526, 65 Pac. 759; *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853; *Back v. State*, 75 Neb. 603, 106 N. W. 787.

31. An affidavit upon information and belief is insufficient: *Herdman v. State*, 54 Neb. 626, 74 N. W. 1097; *State v. Conn*, 37 Ore. 596, 62 Pac. 289. But where the facts are sufficiently definite and positively stated, the presence of matter sworn to upon information and belief is immaterial: *State v. Harris*, 14 N. Dak. 501, 105 N. W. 621; *Davidson v. Munsey*, 29 Utah 181, 80 Pac. 743.

32. But allegations upon information and belief may be sufficient to institute the proceeding for contempt and put the accused to his denial: *Hughes v. Territory (Ariz.)*, 85 Pac. 1058, 6 L. R. A. (N. S.) 572.

33. Omission cured by answer.—Lack of an allegation in the affidavit for contempt proceedings may be cured by an admission in the answer of the accused: *State v. Downing*, 40 Ore. 309, 66 Pac. 917; *State v. Frew*, 24 W. Va. 416, 49 Am. Rep. 257.

34. Judgment must specify the contempt.—The judgment must specify the insulting language used, where such is the basis of the contempt; otherwise, it

is invalid: *In re Elliott*, 9 Kan. App. 265, 59 Pac. 673. To designate by general terms, such as that the same was "insulting and scandalous," etc., is insufficient: *In re Moxcey*, 9 Kan. App. 262, 59 Pac. 672.

35. The record of conviction for contempt must show on its face that the matters charged were within the court's jurisdiction; otherwise, the judgment is invalid: *Otis v. Superior Court*, 148 Cal. 129, 82 Pac. 853.

36. The commitment must specify the particular circumstances of the offense: *Emerson v. Huss*, 127 Wis. 215, 106 N. W. 518.

37. Refusing to answer question.—Recital in commitment.—Commitment of a witness for contempt in refusing to answer a question in a proceeding in which he was called as a witness must recite the question which the witness refused to answer; otherwise, the commitment is void: *Overend v. Superior Court*, 131 Cal. 280, 63 Pac. 372.

38. Defenses.—The truth of published charges as to the motives of the court can not constitute a defense to a charge of criminal constructive contempt. The provisions of the constitution making the truth of the charge a defense to an action for libel do not apply to proceedings instituted to punish for contempt: *People v. News-Times Pub. Co.*, 35 Colo. 253, 84 Pac. 912.

39. The truth or falsity of the published articles relating to pending cases, where the court may, by order, prohibit their publication, is immaterial: *Hughes v. Territory (Ariz.)*, 85 Pac. 1058, 6 L. R. A. (N. S.) 572.

40. Appealability of order.—A judgment or order in contempt proceedings is usually not appealable: *Ex parte Brown*, 3 Ariz. 411, 77 Pac. 489; *People v. Kuhlman*, 118 Cal. 140, 50 Pac. 382; *In re Wittmeyer's Estate*, 118 Cal. 255, 50 Pac. 393; *Blodgett v. State*, 50 Neb. 121, 69 N. W. 751; *Marinan v. Baker*, 12 N. W. 451, 78 Pac. 531; *Borrer v. State (Tex. Cr. App.)*, 63 S. W. 630; *Drainage Dist. No. 1 v. Costello*, 53 Wash. 67, 101 Pac. 497, 498.

In some jurisdictions, however, the order or judgment in such proceedings is made an appealable one: *Merchant v. Pielke*, 9 N. Dak. 245, 83 N. W. 18; *State v. Gray*, 42 Ore. 261, 70 Pac. 904, 71 Pac. 978; *Hebb v. County Court*, 48 W. Va. 279, 49 W. Va. 733, 37 S. E. 676.

CHAPTER CXL.

Nonsuit and Dismissal.

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FORM No. 1177—Dismissal of action by plaintiff.

[Title of court and cause.]

The above-entitled action is hereby dismissed, inasmuch as the matters involved therein were adjudged and settled in and by the above-named court in case No. , entitled , plaintiff, v. , defendant; and the clerk of the above-named court is hereby authorized and directed to enter a dismissal in said action upon the records in his office.

[Date.] A. B., Attorney for plaintiff.

FORM No. 1178—Stipulation of dismissal on compromise.

[Title of court and cause.]

The above-entitled action having been fully settled and compromised, it is hereby stipulated and agreed between the parties thereto that the same may be dismissed, and the clerk of the court is hereby authorized and requested to enter judgment of dismissal therein.

[Date.] A. B., Attorney for plaintiff.
C. D., Attorney for defendant.

FORM No. 1179—Order granting motions for nonsuit, and allowing additional time in which to prepare and serve bill of exceptions.

(In *Castro v. Adams*, 153 Cal. 382; 95 Pac. 1027.)

[Title of court and cause.]

In this action, the parties appearing by their respective attorneys, after evidence submitted on behalf of the plaintiff, Victor Castro, and also on behalf of Clinton C. Tripp, cross-complainant herein, and

after the plaintiff and said cross-complainant and each of them rest, a motion for nonsuit is made on behalf of all the defendants, other than the said Clinton C. Tripp, upon the grounds set forth in the record of the proceedings herein; and the motion being thereupon submitted for consideration and decision, and the court having now sufficiently considered the same:

It is ordered, that the said motion be and the same is hereby granted, to which rule of the court the plaintiff and cross-complainant, by their respective attorneys, except. By consent of counsel, the plaintiff and cross-complainant are hereby granted thirty days in addition to the ten days allowed by law in which to prepare, serve, and file their bill of exceptions herein.

In open court, September 25, 1891.

J. V. Coffey,
Acting Judge.

FORM No. 1180—Judgment of nonsuit.

(In *Booream v. Potter Hotel Co.*, 154 Cal. 99; 97 Pac. 65.)

[Title of court and cause.]

The above-entitled cause came on regularly for trial in the above-entitled court on the 26th day of June, 1906, before Hon. Frank F. Oster, judge presiding in said court at the request of the Hon. J. W. Taggart, superior judge of said county of Santa Barbara; H. C. Booth and L. H. Roseberry appearing as counsel for the plaintiff, and Frank P. Flint, Barker & Bowen, Earl Rogers, and W. S. Day appearing as counsel for the defendant. The jury for the trial of said cause were duly impaneled and sworn, and oral and documentary testimony introduced on behalf of plaintiff in said action. Whereupon, plaintiff closed, and defendant, by its counsel, moved said court to enter a judgment of nonsuit in said action, on the ground that upon the trial the plaintiff had failed to prove a sufficient case for the jury, and stating the respects in which said plaintiff had failed to make such proof, which grounds were specified in said motion. Whereupon, upon motion of said counsel, said court decided to and did grant such motion for nonsuit, and there was caused to be entered in the minutes of said court a minute order granting defendant's motion for nonsuit therein. Now, therefore, pursuant to law and the premises:

It is hereby ordered, adjudged, and decreed, that a judgment of nonsuit be and the same is hereby entered in favor of defendant and

against the plaintiff, on the ground that upon said trial the plaintiff has failed to prove a sufficient case for the jury.

It is hereby further ordered, adjudged, and decreed, that defendant have and recover against plaintiff its costs of suit herein, taxed at \$

Done and dated this 20th day of July, 1906.

Frank F. Oster,
Judge presiding.

§ 492. ANNOTATIONS.—Nonsuit and dismissal.

1. Inherent authority of courts to order dismissal.
- 2-4. Demurrer to evidence as equivalent of motion.
5. Judgment of dismissal as nonsuit.
6. Waiver of motion for nonsuit.—Washington practice.
7. Extent of waiver.
8. Dismissal by plaintiff.—Statutes construed.
9. Rule under Oregon practice.
10. Law of the place governs on motion for nonsuit.
11. Dismissal as to one or more joint debtors.
12. When defendant waives error in denying his motion.

1. Inherent authority of courts to order dismissal.—The rule is generally recognized that the courts have the power independently of the statute or a rule of court to dismiss an action whenever it appears that the plaintiff has, without sufficient excuse, failed to prosecute it to final judgment: *Colorado-Eastern R. Co. v. Union Pacific R. Co.*, 94 Fed. 312, 36 C. C. A. 263; *Ashley v. May*, 5 Ark. 408; *Depuy v. Shear*, 29 Cal. 238; *People v. Jefferds*, 126 Cal. 296, 58 Pac. 704; *State Sav. Bank v. Albertson*, 39 Mont. 414, 102 Pac. 692, 694.

2. Demurrer to evidence as equivalent of motion.—A motion for nonsuit is tantamount to a demurrer to the evidence, or an objection that, admitting all the proved material facts to be true, said facts do not in legal effect operate in favor of the plaintiff, or, in other words, do not entitle him to the relief asked for by him: *Bush v. Wood*, 8 Cal. App. 647, 97 Pac. 709, 710, (negligence); *Kramm v. Stockton Electric R. Co.*, 10 Cal. App. 171, 101 Pac. 914, 918; *Goldstone v. Ice Co.*, 123 Cal. 625, 56 Pac. 776; *Wasserman v. Sloss*, 117 Cal. 425, 49 Pac. 566, 38 L. R. A. 176, 59 Am. St. Rep. 209.

3. A demurrer to the evidence is the counterpart, in some states, of a mo-

tion for nonsuit, and where the same is general it has been held that no question of defect of parties can be raised thereon; for to sustain a ruling upon such ground would be to bar the plaintiff's right of recovery because of a defect to which his attention had not been called and which he was given no opportunity to remedy: *Larimore v. Muller*, 78 Kan. 459, 96 Pac. 852, 953.

4. A demurrer to the evidence admits as true every fact which the testimony tends to prove, and every inference which may reasonably be drawn therefrom: *Kinlen v. Metropolitan St. R. Co.*, 216 Mo. 145, 115 S. W. 523, 527.

5. Judgment of dismissal as nonsuit.—A judgment of dismissal following a failure of the plaintiff to give security for costs, where ordered to do so, is a nonsuit within the purview of the statute of limitations: *Wetmore v. Church*, 188 Mo. 647, 87 S. W. 954, 3 Am. and Eng. Ann. Cas. 94, (applying § 4285, Mo. Rev. St. 1899).

6. Waiver of motion for nonsuit.—Washington practice.—In the state of Washington, it is established law that a motion for nonsuit is waived by putting in evidence in defense: *Port Townsend v. Lewis*, 34 Wash. 413, 75 Pac. 982; *Elmendorf v. Golden*, 37 Wash. 664, 80 Pac. 264; *Conline v. Olympia L. Co.*,

42 Wash. 50, 84 Pac. 407; *Gardner v. Porter*, 45 Wash. 158, 88 Pac. 121; *Cleary v. Contracting Co.*, 53 Wash. 254, 101 Pac. 888, 889.

7. **Extent of waiver.**—The fact that a defendant goes into his defense of an action after the denial of his motion for nonsuit to which he was entitled at the time the motion was interposed operates as a waiver thereof merely to the extent of allowing the plaintiff to benefit by any evidence introduced by defendant or by himself in rebuttal: *Matson v. Port Townsend etc. R. Co.*, 9 Wash. 449, 37 Pac. 705, cited in *Dryden v. Pelton-Armstrong Co.*, 53 Ore. 418, 101 Pac. 190, 191. (See generally as to such waiver extending only to allowing plaintiff the benefit of any evidence thereafter introduced: *Dimuria v. Seattle Transfer Co.*, 50 Wash. 633, 97 Pac. 657, 22 L. R. A. (N. S.) 471; *Bennett v. Northern Pacific E. Co.*, 12 Ore. 49, 6 Pac. 160; *Carney v. Duniway*, 35 Ore. 131, 57 Pac. 192, 58 Pac. 105; *Trickey v. Clark*, 50 Ore. 516, 93 Pac. 457.)

8. **Dismissal by plaintiff.**—**Statutes construed.**—In an action for damages for personal injuries, the witnesses for the defendant testified out of order awaiting the appearance of plaintiff's witnesses. Plaintiff was unable to secure the attendance of his witnesses, and the court, not being inclined to postpone the case for the purpose of obtaining their testimony, the plaintiff made a motion for a voluntary nonsuit. Defendant opposed the motion, and the court overruled the same. Defendant then moved for judgment, which was granted by the court. After motion for new trial was made and denied, judgment was entered dismissing the action, and the plaintiff appealed. Upon the appeal the court held that the plaintiff was entitled as a matter of right under the statute to an order dismissing the action, there being no set-off or counterclaim: *McPherson v. Seattle Electric Co.*, 53 Wash. 358, 101 Pac. 1084, 1085.

Ballinger's Code and Stats. § 5085 is as follows: "An action may be dismissed, or a judgment of nonsuit entered in the following cases: (1) By the plaintiff himself, at any time, either in term time or in vacation, before the jury retire to consider their verdict, unless set-off be interposed as a defense, or unless the defendant sets up a counterclaim to the specific property or thing which is the subject-matter of the action," etc. For right of plaintiff to a voluntary nonsuit under this statute, see *Fiske v. Tacoma Smelting Co.*, 49 Wash. 514, 95 Pac. 1082; *McPherson v. Seattle Electric Co.*, 53 Wash. 358, 101 Pac. 1084, 1085.

9. **Rule under Oregon practice.**—A motion for nonsuit is not waived after denial of the same by the introduction of evidence on behalf of the moving party: *Dryden v. Pelton-Armstrong Co.*, 53 Ore. 418, 101 Pac. 190.

10. **Law of the place governs on motion for nonsuit.**—A motion for judgment of nonsuit is a branch of procedure, and the law of the place of trial must govern in all matters relating to this remedy: *Dryden v. Pelton-Armstrong Co.*, 53 Ore. 418, 101 Pac. 190, 192.

11. **Dismissal as to one or more joint debtors.**—Under the Missouri statute, one suing on a joint contract may dismiss as to one defendant, and proceed so as to show single liability of the other: *Reifschneider v. Beck* (Mo. App.), 129 S. W. 232.

12. **When defendant waives error in denying his motion.**—An error in denying a motion for nonsuit is waived where defendant did not rest his case after denial of the motion, but introduced evidence in his own behalf supplying the defects in plaintiff's proof: *Lyon v. United Moderns*, 148 Cal. 470, 83 Pac. 804, 113 Am. St. Rep. 291, 4 L. R. A. (N. S.) 247, 7 Am. & Eng. Ann. Cas. 672. See *Scrivani v. Dondero*, 128 Cal. 31, 32, 60 Pac. 463, and other cases cited in *Lyon v. United Moderns*, *supra*.

CHAPTER CXLI.

Findings and Judgment.

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§ 493. FINDINGS OF FACT AND CONCLUSIONS OF LAW.

FORM No. 1181—Findings of fact and conclusions of law.

(In County of Glenn v. Klemmer, 153 Cal. 211; 94 Pac. 894.)
[Title of court and cause.]

Findings of fact.

The above-entitled cause having been submitted to the court upon
a stipulation by the respective parties as to the facts, and the court

having considered the same, now, in accordance with said stipulation, the court finds the facts as follows:

1. That all the allegations of plaintiff's complaint on file herein are true.

2. That the claims referred to in said complaint, and each and all of them, are not for work and labor done or performed upon roads and bridges, or roads or bridges, which have been destroyed or rendered impassable by flood or fire in said road district No. 1, of the county of Glenn.

Conclusions of law.

From the foregoing facts the court legally concludes:

That the plaintiff is entitled to a decree perpetually enjoining and restraining defendant, L. J. Klemmer, as treasurer of the said county of Glenn, from paying any and all of said claims, and that said decree also enjoin and restrain intervener, Hochheimer & Co., from enforcing or collecting said claims or any of them from the plaintiff.

That plaintiff is entitled to its costs herein incurred or expended.

Let a decree be entered accordingly.

John F. Ellison,
Judge of Superior Court.

FORM No. 1182—Additional findings.—Action to quiet title, and for value of rents and profits, and for restitution.

(In Gage v. Gunther, 136 Cal. 338; 68 Pac. 710; 89 Am. St. Rep. 141.)¹

[Title of court and cause.]

The above-entitled cause having already been heard upon and submitted for decision of the issues raised by the cross-complaint of defendant, O. H. Newman, and the answer of plaintiff thereto, and the court having heretofore made and filed its findings of fact and conclusions of law upon said issues, and it having been stipulated by all the parties to said action, in open court, upon the hearing of said cause, that the United States patent issued to said plaintiff, Matthew Gage, on April 21, 1896, for section 30, township 2 south of range 4 west of San Bernardino base and meridian, be considered as introduced in evidence, and all of said parties having, after the filing of the findings hereinabove mentioned, entered into, signed, and filed with the clerk of said court a stipulation in writing,

¹ For the complaint and decree in this action, see ch. LII, forms Nos. 430, 442.

whereby they stipulated and agreed that the whole of said cause, including all issues raised by the pleadings therein, both on its legal side and on its equitable side, be considered as submitted to the court upon the evidence theretofore introduced in said cause for determination and decision, without further hearing or introduction of evidence, and that the legal branch of said cause might be decided by the court sitting without a jury, and that said decision of the legal branch of said cause might be made without any findings of fact other than such as had theretofore been made and filed concerning any allegation appearing both in the answer of said defendant, O. H. Newman, the complaint of plaintiff, and in the cross-complaint of said defendant, O. H. Newman, filed with said answer; and the plaintiff having waived all claim to damages against said defendant:

Now, after due deliberation, the court finds the following facts:

1. That on the 21st day of April, 1896, the plaintiff, Matthew Gage, was, and ever since has been, and now is, the absolute owner of, seized in fee of, and entitled to the possession of, that certain tract and tracts of land situated in the county of Riverside, and state of California, and described as follows, to wit: [Here follows description.]

That it is not true that the title under which the plaintiff claims said land is of no validity, or that whatever paper title said plaintiff may have in said land is held in trust for the defendant, O. H. Newman.

2. That plaintiff's claim to said land is based upon a United States patent issued to said plaintiff on the 21st day of April, 1896, and that said patent was issued upon a desert-land entry made by said plaintiff on the 1st day of March, 1882, and that said section 30 was on said 1st day of March, 1882, and ever since has been, an even section of land within the limits of a grant of land made by Congress to the Southern Pacific Railroad Company; but that said section 30 was nevertheless subject to entry and sale under the desert-land law when said plaintiff made his application to purchase the same under his desert-land application.

3. That the said patent issued as aforesaid to said plaintiff was not issued without authority of law, and was not null and void; but that said patent was lawfully issued, and was a valid conveyance of said land to the plaintiff.

4. That while the plaintiff was and is so the absolute owner of said premises, and entitled to the possession thereof, the defendant, O. H.

Newman, has entered into possession of said premises without right, title, or license from the plaintiff, and wrongfully withholds the possession of the same from the plaintiff, and still continues to withhold possession from plaintiff.

Conclusions of Law.

As conclusions of law from the foregoing facts the court finds: That the plaintiff is entitled to judgment against the defendant, O. H. Newman, for the recovery of possession of the real property described in the complaint of said plaintiff, and that a writ of possession issue from this court removing said defendant, O. H. Newman, from said land and restoring plaintiff to the possession thereof.

Let judgment be entered in accordance with these findings, and with the findings heretofore made and filed herein.

Dated July 17, 1889.

J. S. Noyes, Judge.

§ 494. JUDGMENTS.

FORM No. 1183—Judgment for plaintiff by the court.

[Title of court and cause.]

This cause came on regularly for trial, on the day of , 19 , appearing as counsel for the plaintiff, and for the defendant. A trial by jury having been expressly waived by the counsel for the respective parties, the cause was tried before the court sitting without a jury; whereupon witnesses on the part of the plaintiff and defendant were sworn and examined, and, the evidence being closed, the cause was submitted to the court for consideration and decision, and, after due deliberation thereon, the court delivers and files its findings and decision in writing, and orders that judgment be entered in accordance therewith. Wherefore, by reason of the law and the findings and decision aforesaid:

It is ordered, adjudged, and decreed, that the plaintiff, , do have and recover of and from the defendant, , the sum of \$, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$.

Judgment rendered this day of , 19 .

S. T., Judge.

FORM No. 1184—Judgment for defendant. (Common form.)

[Title of court and cause.]

The above-entitled action coming on regularly for hearing on this day of , 19 , appearing for plaintiff, and appearing for defendant, and evidence having been introduced by each of the respective parties, and said cause having been submitted for decision, and the court, being fully advised, having rendered its findings of fact and conclusions of law herein, wherein judgment is ordered in favor of the defendant and against the plaintiff: Now, therefore, by reason of the law and the findings aforesaid:

It is ordered, adjudged, and decreed, that the plaintiff take nothing by this action, and that defendant have judgment for his costs herein, taxed at \$.

[Date of rendition.]

S. T., Judge.

[Entry.]

FORM No. 1185—Entry by clerk.

[Proceed as in either of foregoing forms, as the judgment may be, to the conclusion.]

Judgment rendered this day of , 19 .

[Seal.]

, Clerk.

[Entry.]

By

, Deputy Clerk.

FORM No. 1186—Judgment by the court on verdict for the plaintiff.

(In Braly v. Fresno City R. Co., 9 Cal. App. 417; 99 Pac. 400.)

[Title of court and cause.]

This action came on regularly for trial. The said parties appeared by their attorneys, Messrs. L. L. Cory and M. K. Harris, counsel for plaintiff, and Frank H. Short, F. E. Cook, and Everts & Ewing, counsel for defendant. A jury of twelve persons were regularly impaneled and sworn to try said action. Witnesses on the part of plaintiff and defendant were sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the court, the jury retired to consider their verdict, and subsequently returned into court, and, being called, answered to their names and said: "We, the jury in the above-entitled cause, find for the plaintiff, and assess his damages at the sum of \$5,000. F. L. Bagley, Foreman."

Wherefore, by verdict of the law, and by reason of the premises

aforesaid, it is ordered, adjudged, and decreed, that plaintiff, J. M. Braly, do have and recover from defendant, Fresno City Railway Company, a corporation, the sum of \$5,000, and also said plaintiff do have and recover from said defendant his costs and disbursements incurred in this action, amounting to the sum of \$98.70.

Dated April 12, 1907.

George E. Church,

Judge of Superior Court.

[Endorsements of filing and recording.]

FORM No. 1187—Judgment for plaintiff on verdict. (Entry by clerk.)

(In *Schneider v. Market Street R. Co.*, 134 Cal. 482; 66 Pac. 734.)

[Title of court and cause.]

This cause came on regularly for trial, William J. Herrin, Esq., appearing as counsel for the plaintiff, and W. H. L. Barnes, Esq., for the defendant. Thereupon, a jury of twelve persons were duly selected, impaneled, and sworn to try said cause; and witnesses on the part of the plaintiff and defendant were duly sworn and examined. After hearing the evidence, the arguments of counsel, and the instructions of the court, the cause was submitted to the jury, who retired to deliberate upon their verdict, and subsequently returned into court, and, being called, all answered to their names, and then rendered the following verdict, which was accepted by the court and entered on the minutes, as follows: [Here follows verdict of jury as in form No. 1186.]

Wherefore, by virtue of the law, and by reason of the premises aforesaid:

It is ordered, adjudged, and decreed, that the plaintiff, _____, have and recover from the defendant, _____, the sum of \$ _____, with interest thereon at the rate of _____ per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in this action, amounting to the sum of \$ _____.

Judgment rendered this _____ day of _____, 19 ____.

[Seal.]

_____, Clerk.

By _____, Deputy Clerk.

FORM No. 1188—Judgment of dismissal. (Entry by clerk.)

[Title of court and cause.]

On application of the plaintiff, and upon payment by him of all costs, and no counterclaim having been made, or affirmative relief sought by cross-complaint or answer of the defendant, a request for

dismissal of this cause having been duly entered in the register of actions in the office of the clerk of this court, said cause is therefore hereby dismissed.

Judgment entered this day of , 19 .

[Seal.]

, Clerk.

By

, Deputy Clerk.

FORM No. 1189—Judgment of default. (Entry by clerk.)

[Title of court and cause.]

In this cause, defendant, , having been regularly served with process, and having failed to appear and answer the plaintiff's complaint, and the time for answering having expired, and the default of the defendant having been duly entered according to law, upon application of the plaintiff to the clerk, judgment is hereby entered against defendant in accordance with the prayer of said complaint. Wherefore, by virtue of the law and by reason of the premises aforesaid:

It is ordered, adjudged, and decreed, that plaintiff have and recover of and from defendant the sum of \$, with interest thereon at the rate of per cent per annum from the date hereof until paid, together with plaintiff's costs and disbursements incurred in said action, amounting to the sum of \$, and that plaintiff have execution therefor.

Judgment rendered , 19 .

[Seal.]

, Clerk.

By

, Deputy Clerk.

FORM No. 1190—Notice of motion for judgment on the pleadings.

(In *Levy v. Lyon*, 153 Cal. 213; 94 Pac. 881.)

[Title of court and cause.]

To M. J. Lyon, defendant above named, and Milton L. Schmitt, his attorney:

Please take notice, that the plaintiff will on Monday, January 29, 1906, at the above-named court, in the courthouse at San Jose, California, in department No. 2 thereof, at the hour of 10 o'clock A. M. of said day, or as soon thereafter as counsel can be heard, move the above-named court for judgment on the pleadings in said action, on the ground that the answer and cross-complaint filed therein are sham, frivolous, and wholly insufficient to constitute a defense to the

said action, and wholly barren of any equities or claims of right in the defendant to entitle him to the relief sought, or to any equitable, legal, or other relief whatsoever.

Said motion will be based upon the pleadings on file in the action.

E. M. Rosenthal,

Attorney for plaintiff.

FORM No. 1191—Order sustaining demurrer without leave to amend, and granting motion for judgment on the pleadings.

(In *Levy v. Lyon*, 153 Cal. 213; 94 Pac. 881.)

[Title of court and cause.]

This cause coming on regularly for hearing at this time, after argument by the respective attorneys, and the court being fully advised in the premises:

It is ordered, that the demurrers to the answer and cross-complaint be and the same are hereby sustained without leave to amend.

It is further ordered by the court, that plaintiff's motion for judgment on the pleadings be and the same is hereby granted.

[Date.]

M. H. Hyland, Judge.

FORM No. 1192—Consent of plaintiff to reduction of judgment.

(In *O'Rourke v. Finch*, 9 Cal. App. 324; 99 Pac. 392.)

[Title of court and cause.]

To defendants herein, and their attorneys, Messrs. Lynch & Drury:

You and each of you will please take notice, that judgment having been rendered in this cause for the sum of \$1,000 in favor of said plaintiff and against you, the said defendants, and that the said court, on the 2d day of December, 1907, upon the motion for a new trial herein, after the same was argued and submitted for decision, rendered its decision on said motion, and granted the same, unless the plaintiff, within twenty days from the rendering of said decision, consent and agree to the reduction of said judgment from said sum of \$1,000 to the sum of \$750: Now come the said plaintiff and his attorneys, W. H. Morrissey and Don. R. Jacks, within said twenty days after the date of the order aforesaid, to wit, on this, the 12th

day of December, 1907, and consent to and agree that said judgment be reduced from the sum of \$1,000 to the sum of \$750.

John H. J. O'Rourke, Plaintiff,
By Frank J. O'Rourke, his guardian ad litem.
W. H. Morrissey,
Don. R. Jacks,
Attorneys for plaintiff.

FORM No. 1193—Nunc pro tunc order reducing judgment.

(In O'Rourke v. Finch, 9 Cal. App. 324; 99 Pac. 392.)

[Title of court and cause.]

This court having, on the 2d day of December, 1907, made and entered its order on defendants' motion for a new trial, to the effect that a new trial in this action would be granted, unless plaintiff within twenty days from the entry of said order consent that the verdict and judgment herein be reduced from the sum of \$1,000, for which said judgment was heretofore rendered and entered, to the sum of \$750, in which event an order would be made denying said motion for a new trial, and it appearing that plaintiff, by a written consent filed in open court on the 12th day of December, 1907, has agreed to said reduction of said verdict and judgment to said sum of \$750:

It is therefore hereby ordered, that the verdict and judgment in the above-entitled action heretofore entered for the sum of \$1,000 be and the same is hereby reduced to the sum of \$750.

Dated February 4, 1908. This order to be entered nunc pro tunc as of December 12, 1907.

John Hunt,
Judge of Superior Court.

FORM No. 1194—Satisfaction of judgment for costs.

[Title of court and cause.]

Full satisfaction and payment is hereby acknowledged of that certain judgment made and rendered in and by the above-named court in the above-entitled action, and duly entered in book of judgments at page , on the day of , 19 , in favor of plaintiff therein and against defendants, for the sum of \$, plaintiff's costs incurred in said action; and the clerk of said court is hereby authorized and directed to enter the satisfaction thereof in said action.

[Date.]

D. E., Plaintiff.

FORM No. 1195—Amended judgment for defendant.

(In *Burkett v. Griffith*, 90 Cal. 532; 27 Pac. 527; 25 Am. St. Rep. 151; 13 L. R. A. 707.)

[Title of court and cause.]

In this action the defendant having appeared and demurred to the plaintiff's complaint herein, and the issue of law thereto arising having been duly submitted to the court by the respective parties plaintiff and defendant, and the court being fully advised in the premises, did heretofore sustain said demurrer, and refused leave to plaintiff to amend his complaint, and the defendant having heretofore applied to the clerk of the court to enter judgment herein, and said clerk having, pursuant to such application, entered a judgment herein against the defendant for the costs in this action, and said clerk having failed to make an entry of judgment with reference to the disposition of the case itself, and the defendant being entitled to a judgment dismissing said action, as well as for costs herein:

It is therefore ordered, adjudged, and decreed, that the judgment heretofore entered in said cause be amended so as to read as follows:

It is by the court further ordered, adjudged, and decreed, that said action be and the same is hereby dismissed, and that defendant do have and recover from plaintiff his, defendant's, costs and disbursements incurred in this action, amounting to the sum of \$5.70.

[Date.]

Walter Van Dyke,
Judge of Superior Court.

FORM No. 1196—Order of sheriff's sale of real estate under judgment.

[Title of court and cause.]

The people of the state of _____, to the sheriff of said county, greeting:

Whereas, _____, on the _____ day of _____, 19____, recovered a judgment against _____ in an action wherein the said _____ was plaintiff, and the said _____ was defendant, which said judgment is recorded in judgment book _____, of the said [superior] court, on page _____, and which is in the words and figures following, to wit: [Here copy the judgment which provides for such sale.]

Now, therefore, you, the said sheriff of the county of _____, are hereby commanded and required to proceed to give notice for sale, and to sell, the premises hereinbefore described, for gold coin of the United States, and to apply the proceeds of such sale to the

satisfaction of said judgment, with the interest thereon and costs, together with your fees, and to make and file your report of such sale to the clerk of the said superior court within days from the date hereof, and to do all things according to the terms and requirements of the said judgment, and the provisions of the statute in such case made and provided.

Witness the Hon. _____, judge of the superior court of the county
of _____, state of _____, and the seal of said court, this _____ day
of _____, 19____.

[Seal.]

, Clerk.

By

, Deputy Clerk.

[Endorsements on the foregoing writ:]

Clerk's fees, as follows:

This writ \$

Docket and filing.....\$

Satisfaction \$

Total clerk's fees on writ.\$

Attest :

, Clerk.

By

, Deputy Clerk.

[Filing endorsement.]

Form of judgment in an action brought by an assignee to determine the rights of the plaintiff in and to a large amount of personal property and notes mortgaged and pledged by his assignor: Mowry v. First Nat. Bank, 54 Wis. 43, 11 N. W. 247.

§ 495. CONFESSION OF JUDGMENT WITHOUT ACTION.

FORM No. 1197—Confession of judgment.

[Title of court and cause.]

I, John Doe, defendant in the above-entitled action, do hereby confess judgment herein in favor of the plaintiff, Richard Roe, for the sum of \$ _____, and I hereby authorize entry of judgment herein for said amount in favor of said plaintiff. I hereby state that said sum of \$ _____, for which judgment is confessed herein, is justly due [or justly to become due] from me to the said Richard Roe, the facts concerning which are as follows: [Here state facts briefly to show that the sum confessed is justly due or to become due.] [If the confession of judgment be for the purpose of securing the plaintiff against a contingent liability, add: "And I further state that this confession of judgment is for the purpose of securing the plaintiff against a contingent liability, and that the facts thereof are as follows: (Here state concisely the facts constituting such liabil-

ity); and further, that the sum confessed therefor does not exceed the amount of said contingent liability.'']

[Verification.]

[Signature.]

FORM No. 1198—Entry of judgment confessed. (Annexed to the foregoing.)

[Title of court and cause.]

On filing the within and foregoing statement, confession, and verification [or affidavit], wherein judgment is authorized and consented to be entered in favor of plaintiff herein for the sum of \$:

It is therefore ordered and adjudged, that the plaintiff do have and recover of and from the defendant herein the sum of \$, together with \$, costs herein.

[Date.]

, Clerk.
By , Deputy.

For form of judgment on the pleadings in an action to set aside and vacate a judgment, see *Randall v. Fox* (Ariz.), 108 Pac. 249, 250.

For form of final judgment in an action to recover for injuries alleged to have been sustained by plaintiff while in the defendant's employ, and through defendant's negligence, the same affirmed on appeal, and held not a judgment of nonsuit, see *McGuire v. Bryant etc. Co.*, 53 Wash. 425, 102 Pac. 237, 238.

§ 496. ANNOTATIONS.—Findings and judgment.

1. Findings.—As to averments not denied.
- 2, 3. General rule as to findings on separate counts.
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1. **FINDINGS.**—As to averments not denied.—Where, in a verified complaint, a material fact is alleged, and the answer fails to deny the same, the truth

of such an averment is admitted, and no finding on the subject is necessary: *Los Angeles P. B. Co. v. Higgins*, 8 Cal. App. 514, 97 Pac. 414, 420.

2. **General rule as to findings on separate counts.**—As a general rule, where there are several counts in a petition, each stating a different cause of action, there should be a separate finding on each: *Cramer v. Barmon*, 193 Mo. 329, 91 S. W. 1038; *Brownell v. Pacific R. Co.*, 47 Mo. 239; *Clark v. Hannibal etc. R. Co.*, 36 Mo. 202, 212; *Russell v. Railroad Co.*, 154 Mo. 428, 55 S. W. 454.

3. One finding, however, is sufficient where the several counts relate to the same transaction: *Southern Missouri etc. R. Co. v. Wyatt*, 223 Mo. 347, 122 S. W. 688; *State v. Pitts*, 58 Mo. 556; *State v. Jennings*, 81 Mo. 185, 51 Am. Rep. 236; *State v. Bean*, 21 Mo. 267; *State v. McCue*, 39 Mo. 112.

4. **Finding as to truth of allegations generally.**—A finding that all of the allegations in a particular paragraph or pleading are true or untrue is sufficient: *Heinrich v. Heinrich*, 2 Cal. App. 479, 482, 84 Pac. 326, (by wife against husband, to enforce a trust). See, also, *Gale v. Bradbury*, 116 Cal. 39, 40, 47 Pac. 778, (for money judgment); *Williams v. Hall*, 79 Cal. 606, 607, 21 Pac. 965, (upon contract for the payment of money).

5. **Remedy where findings are imperfect.**—An imperfect verdict or finding, or a neglect to find on all the issues, can be taken advantage of only by motion in arrest of judgment: *Wells v. Adams*, 88 Mo. App. 215, 228; *Grier v. Strother*, 111 Mo. App. 386, 85 S. W. 976; *Jonesboro etc. R. Co. v. United Iron Works Co.*, 117 Mo. App. 167, 94 S. W. 726; *Southern Missouri etc. R. Co. v. Wyatt*, 223 Mo. 347, 122 S. W. 688, 691.

6. **VERDICT.**—**Defective statement of cause cured by.**—A defective statement of a cause of action may be good after verdict: *H. A. Johnson & Co. v. Springfield Ice etc. Co.*, 143 Mo. App. 441, 127 S. W. 692.

7. **Presumptions after verdict.**—Every reasonable presumption and intendment should be indulged from the facts alleged in the petition, after verdict, and in aid thereof: *Thomasson v. Mercantile etc. L. Co.*, 217 Mo. 485, 116 S. W. 1092, 1096.

For additional authorities as to the

foregoing principle, see chapter VIII, annotation paragraphs 18-21.

8. On a motion for a directed verdict, the court is justified in denying the same if a substantial conflict exists in the evidence on any material issue: *Gooler v. Eldness* (N. Dak.), 121 N. W. 83, 85.

9. **JUDGMENT GENERALLY.**—**Definition.**—Primarily, a "judgment," except where the signification of the word has been changed by statute, is the decision pronounced by the court upon the matter contained in the record. Thus it has frequently been held that there is a difference between a judgment and the entry thereof. The rendition of a judgment is a judicial act, and the entry upon the record is purely ministerial. Save for some statute, entry of record is not indispensable to a judgment; but it is just as clear that a judgment is essential to the validity of an entry. Under the old practice, and in the absence of statute, it seems that there was a radical difference between the entries of judgments and decrees. A "judgment" can speak but by the record, while a "decree" takes effect immediately after being pronounced by the court. Its enrolment adds nothing to its force or its competency as evidence: *Burke v. Burke*, 142 Iowa 206, 119 N. W. 129, 131, citing *Freeman on Judgments*, § 38; *Bates v. Delavan*, 5 Paige 303; *Winans v. Dunham*, 5 Wend. 47; *Butler v. Lee*, 3 Keyes, (42 N. Y.) 73; *Lynch v. Rome Co.*, 42 Barb. 591.

10. **Iowa statutes relating to entry of judgment.**—A judgment rendered and entered in vacation without consent of the parties or an order of court entered during term time is void. But judgments and decrees ordered and rendered during term time may be entered in vacation: *Burke v. Burke*, 142 Iowa 206, 119 N. W. 129, citing and construing Iowa code §§ 242, 247, and further citing *Traer v. Whitman*, 56 Iowa 443, 9 N. W. 339; *Smith v. Cumins*, 52 Iowa 143, 2 N. W. 1041.

11. **Irregular entry of decree.**—The remedy is by motion, not by objection made on appeal, where a decree is irregularly entered, inasmuch as that fact does not render the decree void: *Burke v. Burke*, 142 Iowa 206, 119 N. W. 129, 131, citing to the same effect *Collins v. Chantland*, 48 Iowa 241; *State v. Hen-*

derson, 164 Mo. 347, 64 S. W. 138, 86 Am. St. Rep. 618.

12. **Personal judgment is not valid against non-resident.**—Even when citation and notice by publication in the mode provided by statute is given to a non-resident defendant who does not appear, no valid personal judgment can be rendered against him. In such case, if the non-resident defendant has property within the territorial jurisdiction of the court, the same may be reached by attachment and proper notice by publication. The court so far acquires jurisdiction of the property, as a proceedings in rem, as to ascertain the obligation of the defendant, and to apply the proceeds of the attached property in satisfaction of the same: *Pennyroyer v. Neff*, 95 U. S. 714, 24 L. ed. 565, cited in *Smith v. Montoya*, 3 N. Mex. 40, 1 Pac. 175.

13. **Judgment upon issue of law where unliquidated damages are claimed.**—As to whether the demurrer, for its own purpose, admits the amount of damages alleged in the bill arising from the alleged violation of an agreement; held, that the Missouri statute (Rev. Stats. 1899, §§ 774-776, Ann. Stats. 1906, p. 751) contemplates that if judgment be rendered on demurrer, on an issue of law, where the damages can not be ascertained by the written instrument sued on, but remain unliquidated, inquiry should be had into the amount of the damages: *Donovan v. Boeck*, 217 Mo. 70, 116 S. W. 443, 546, citing *Darrah v. Steamboat Lightfoot*, 15 Mo. 187; *McKenzie v. Mathews*, 59 Mo. 99.

14. **Joint judgment against defendants guilty of tort.**—In actions against two or more persons for a single tort, there can not be two verdicts for different sums against different defendants in the same trial. There can be but one verdict for a single sum against all who are found guilty of the tort. All who are guilty at all are liable for the full amount of the actual damages arising from the injuries inflicted, regardless of the degree of culpability: *Marriott v. Williams*, 152 Cal. 705, 711, 93 Pac. 875, 125 Am. St. Rep. 87; *McCool v. Mahoney*, 54 Cal. 491; *Nichols v. Dunphy*, 58 Cal. 605; *Everroad v. Gabbert*, 83 Ind. 489; *Huddleston v. Borough*, 111 Pa. St. 110, 2 Atl. 200.

15. **Motion in arrest of judgment.**—The office of a motion in arrest of judgment

is to direct the attention of the court to errors apparent on the face of the record proper: *State v. Gochler*, 193 Mo. 177, 181, 91 S. W. 947.

16. **Motion in arrest.**—When defendant may invoke.—A motion in arrest of judgment is a remedy which the defendant may invoke where the face of the petition shows plaintiff not to have a cause of action; this remedy is the counterpart existing in favor of the defendant of the remedy by motion for judgment non obstante veredicto, which is expressly one allowed to the plaintiff: *Shearer v. Guardian Trust Co.*, 136 Mo. App. 229, 116 S. W. 456, 457.

17. **Motion in arrest for defect in verdict.**—Where no motion in arrest of judgment is made for defect in the verdict, such defect can not be considered as error on appeal: *Finney v. State to use, etc.*, 9 Mo. 635; *Stout v. Calver*, 6 Mo. 256, 35 Am. Dec. 438; *State v. DeWitt*, 186 Mo. 61, 68, 84 S. W. 956; *Southern Missouri etc. R. Co. v. Wyatt*, 223 Mo. 347, 122 S. W. 688, 691, (to condemn right of way for railroad).

18. **A motion for judgment non obstante veredicto is not a motion allowed the defendant in a cause.** In point of legal practice, it is a motion which a plaintiff may make where, on account of defendant's answer, he, defendant, is not entitled to a judgment in his favor. It is only proper where, upon the defendant's own showing, in any way of putting it, he can have no merits, nor can the issue joined thereon be found for him. Where the awarding of a repleader can not mend the case, the court for the sake of the plaintiff will at once give judgment non obstante veredicto: *Shearer v. Guardian Trust Co.*, 136 Mo. App. 229, 116 S. W. 456, 457, and authorities cited, including *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *Bradshaw v. Hedge*, 10 Iowa 402; *Williams v. Anderson*, 9 Minn. 50 (Gil. 39); *Friendly v. Lee*, 20 Ore. 202, 25 Pac. 396; *Hurt v. Ford*, 142 Mo. 283, 44 S. W. 228, 41 L. R. A. 823.

19. **Motion to vacate for error of fact.**—Missouri practice.—In the state of Missouri, a motion to vacate a judgment for error of fact, and not for patent error of record, supported by evidence dehors the record, takes the place of the common-law writ of error coram nobis, and is in the nature of an indictment and direct attack upon

the judgment of the court committing the error. A judgment upon such a motion is within itself a final judgment, from which an appeal will lie. A trial court will not be compelled by mandate where the remedy is open by way of appeal from an order overruling the motion to vacate a judgment of dismissal, voidable only: *State v. Riley*, 219 Mo. 667, 118 S. W. 647, 656.

20. Motion to vacate a judgment, charging the fact of death, and supported by proof, takes the place of the common-law writ of error coram nobis: *State v. Riley*, 219 Mo. 667, 118 S. W. 647, 651.

21. Judgment upon the pleadings.—As a general proposition, a motion for judgment on the pleadings, based on the facts thereby established, can not be sustained except where, upon such facts, a judgment different from that pronounced could not be rendered, notwithstanding any evidence which might be produced; or, in other words, such a motion can not be sustained unless, under the admitted facts, the moving party is entitled to judgment, without regard to what the findings might be on the facts upon which issue is joined. Therefore, in determining the rights of the defendant to the judgment given him, the real question to determine is the sufficiency of the admitted facts to warrant the judgment rendered and the materiality of those on which issue was joined. A motion for judgment on the pleadings can not prevail unless, on facts thereby established, the court, as a matter of law, can pronounce a judgment on the merits; that is, determine the rights of the parties to the subject-matter of the controversy, and render a judgment in relation thereto which is final between the parties. Such a motion can not, under the guise of a motion for judgment on the pleadings, be substituted for some other plea: *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241, citing *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720; *Harris v. Harris*, 9 Colo. App. 211, 47 Pac. 841, approved in *Hoover v. Horn*, 45 Colo. 288, 101 Pac. 55, 56, and in *Roberts v. Colorado Springs etc. R. Co.*, 45 Colo. 188, 101 Pac. 59, 61.

22. Motion not substitute for demurrer.—A motion for judgment upon the pleadings can not be made to take the place of a demurrer or other plea:

Roberts v. Colorado Springs etc. R. Co., 45 Colo. 188, 101 Pac. 59, 61; *Schuler v. Allan*, 45 Colo. 372, 101 Pac. 350, 352.

23. A motion for judgment on the pleadings can not be converted into a general demurrer: *Schuler v. Allan*, 45 Colo. 372, 101 Pac. 350, 352, citing *Harris v. Harris*, 9 Colo. App. 211, 47 Pac. 841; *Mills v. Hart*, 24 Colo. 505, 52 Pac. 680, 65 Am. St. Rep. 241; *Rice v. Bush*, 16 Colo. 484, 27 Pac. 720; *Cornett v. Smith*, 15 Colo. App. 53, 60 Pac. 953; *Hoover v. Horn*, 45 Colo. 288, 101 Pac. 55.

24. Motion admits truth of pleas.—A motion for judgment upon the pleadings admits that the statements in the pleas are true: *Roberts v. Colorado Springs etc. R. Co.*, 45 Colo. 188, 101 Pac. 59, 61.

25. When a party moves for judgment on the pleadings, he not only, for the purpose of his motion, admits the truth of all the allegations of his adversary, but also must be deemed to adopt all his adversaries' denials: *Phenix v. Bijelich*, 30 Nev. 257, 95 Pac. 351, 353, citing *Walling v. Bown*, 9 Idaho 184, 72 Pac. 960; *Idaho P. M. Co. v. Green*, 14 Idaho 294, Pac. 161, 164.

26. Motion proper when denials are only of conclusions.—A judgment on the pleadings is proper where the denials in the answer are only of conclusions, and not of the facts constituting the plaintiff's cause of action. Denials which relate only to the effect of such facts are immaterial: *Thompson v. Colvin*, 53 Ore. 488, 101 Pac. 201, 202, citing *Bump v. Cooper*, 20 Ore. 527, 26 Pac. 848.

27. Relation of inconsistent defenses to the motion.—On a motion for judgment on the pleadings, inconsistent defenses can not be regarded as vitiating one another; but if a good defense is stated in the answer, it must be considered as true: *Hoover v. Horn*, 45 Colo. 288, 101 Pac. 55, 56.

28. Arizona practice.—Judgment on the pleading is a practice recognized by the courts of Arizona: *Randall v. Fox (Ariz.)*, 108 Pac. 249, 250, citing *Miles v. McCallan*, 1 Ariz. 491, 3 Pac. 610; *Finley v. City of Tucson*, 7 Ariz. 108, 60 Pac. 872.

29. Waiver of motion.—A motion for judgment on the pleadings is held to be waived by the defendant where he goes to trial on the merits: *Sundmacher v. Lloyd*, 135 Mo. App. 517, 116 S. W. 12, 13.

CHAPTER CXLII.

Costs, Executions, and Writs.

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§ 497. COSTS.

FORM No. 1199—Notice requiring security for costs.

[Title of court and cause.]

To A. B., Attorney for plaintiff:

Please take notice, that the defendant hereby demands and re-
quires security from E. F., plaintiff, who is a non-resident of this

state [or is a foreign corporation], for defendant's costs and charges in this action which may be awarded herein against the plaintiff.

[Date.] C. D., Attorney for defendant.

FORM No. 1200—Notice of motion to stay proceedings until security for costs be given.

[Title of court and cause.]

To A. B., Attorney for plaintiff:

Please take notice, that defendant will move said court at the courtroom thereof on the day of , 19 , at o'clock M., or as soon thereafter as counsel can be heard, for an order staying proceedings in this action until plaintiff give security to defendant for his costs and charges which may be awarded to him in the action. Said motion will be based on the complaint in the action, and on an affidavit, a copy of which is herewith served, and will be made on the ground that plaintiff is a non-resident of this state [or is a foreign corporation].

[Date.] C. D., Attorney for defendant.

FORM No. 1201—Memorandum of costs and disbursements on part of plaintiff [or defendant].

[Title of court and cause.]

Disbursements.

Sheriff's fees\$
Clerk's fees\$
Witnesses' fees [here naming the witnesses and
designating days of service].....\$
Reporter's fees\$

FORM No. 1202—Verification of the foregoing.

State of , }
County of . } ss.

 , being duly sworn, deposes and says: That he, , is the attorney for the plaintiff [or defendant] in the above-entitled action, and, as such, is better informed relative to the above costs and disbursements than the plaintiff [or defendant]; that the items in the above memorandum contained are correct, to the best of this depon-

ent's knowledge and belief, and the said disbursements have been necessarily incurred in said action.

[Signature of affiant.]

[Jurat of notary or clerk.]

FORM No. 1203—Acknowledgment of service of a copy of memorandum of costs. (Endorsed upon memorandum of costs.)

Due service of a copy of the within memorandum of costs is hereby admitted this day of , 19 .

A. B., Attorney for .

[Endorsement of filing.]

§ 498. WRITS OF EXECUTION, ASSISTANCE, ETC.

FORM No. 1204—Writ of execution on judgment.

[Title of court and cause.]

The people of the state of to the sheriff of the county of , greeting:

Whereas, on the day of , 19 , , plaintiff, recovered a judgment in the superior court in and for said county of , state aforesaid, against , defendant, for the sum of \$ damages, together with \$ costs and disbursements at the date of said judgment, with interest on said sum at the rate of per cent per from date of said judgment until paid, as appears to us of record;

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office of said court in the county of , and the said judgment was docketed in said clerk's office in said county, on the day and year first above written; and the sum of \$, as aforesaid, is at the date of this writ actually due on said judgment, together with the interest thereon as aforesaid, and \$ for this and other accruing costs:

Now you, the said sheriff, are hereby required to make the said sums due on said judgment for damages and costs, and interest thereon as aforesaid, and accruing costs, to satisfy the said judgment, out of the personal property of the said debtor, ; or, if sufficient personal property of said debtor can not be found, then out of the real property in your county belonging to , the said debtor, on the day whereon said judgment was docketed in the aforesaid county, or at any time thereafter, and make return of

Now you, the said sheriff, are hereby required to pay the said sums due on the said judgment, with interest as aforesaid, and costs and

accruing costs, to satisfy the said judgment out of the personal property of said debtor; or, if sufficient personal property of said debtor can not be found, then out of the real property in your county belonging to said debtor, Montauk Consolidated Gold Mining Company, a corporation, on the date whereon said judgment was docketed in the said county, or at any time thereafter. And make return of this writ within sixty days after your receipt hereof, the date of which receipt you have now endorsed hereon.

Witness the Hon. J. E. Prewett, judge of said superior court in and for the county of Placer, state of California, at the courthouse in the county of Placer, this 5th day of June, 1901.

Attest my hand and the seal of the said court, the day and year last above written.

[Seal.]

J. B. Landis, Clerk.

[Return endorsed:] "Nulla bona." [See form No. 1206.]

FORM No. 1206—Sheriff's return of execution unsatisfied. (Annexed to foregoing writ.)

(From the record in *Nixon v. Goodwin*, 3 Cal. App. 358; 85 Pac. 169.)

[Venue.]

I, Charles Keena, sheriff of the county of Placer, hereby certify that I received the within execution on the 5th day of June, 1901, and that, after due search and diligent inquiry, I have been unable to find any property, real or personal, belonging to the Montauk Consolidated Gold Mining Company, a corporation, upon which to levy in the said county of Placer, and I hereby return the within execution wholly unsatisfied.

Dated June 11, 1901.

Charles Keena, Sheriff.

By William I. May, Deputy Sheriff.

[Filing endorsement.]

FORM No. 1207—Sheriff's return of execution unsatisfied.—Property claimed by third person.

(In *Nixon v. Goodwin*, 3 Cal. App. 358; 85 Pac. 169.)

[Title of court and cause.]

I hereby certify, that on the 5th day of June, 1901, I received the execution in the above-entitled action hereunto attached, issued

against the defendant for the sum of \$9,150, with interest and costs, duly attested, June 5, 1901; that on the 6th day of June, 1901, I levied upon thirty-six cords of mixed oak wood upon the premises of the Montauk Consolidated Mine in El Dorado County, California, and in the possession of C. H. Mars; that thereafter, on said 6th day of June, 1901, upon instructions given to me by the attorneys for the plaintiff, I released said property so levied upon, the same being claimed by a third party.

I further certify, that on said 6th day of June, 1901, I served upon Edward Goodwin, the superintendent of said Montauk Consolidated Gold Mining Company, a copy of said execution and a notice to the effect that the property belonging to the said defendant corporation in his hands or under his control was levied upon, and said Goodwin on said day made answer in writing certifying that he had no money or other property belonging to said defendant in his possession, a copy of which said written answer of said Goodwin is hereunto attached and hereby referred to and made a part of this return.

I further certify, that, after diligent search, I am unable to find any personal property belonging to said defendant corporation in El Dorado County, California, nor have I been able to find any real property standing of record in the name of said defendant in said county, and I therefore return the attached execution wholly unsatisfied for the reasons aforesaid.

Dated June 6, 1901.

A. S. Bosquit, Sheriff.

FORM No. 1208—Writ of execution for fees and costs.

[Title of court and cause.]

The people of the state of _____ to the sheriff of the county
of _____, greeting:

Whereas, in a certain action pending in the superior court of the county aforesaid, wherein there is due to [here naming the officer and designating his official character], of said _____, from _____, for fees in said cause, the sum of \$ _____, in gold coin of the United States;

And whereas, by virtue of section 38 of an act to regulate fees in office, approved March 5, 1870, the said [officer] is authorized to

issue execution in his own name against the party from whom fees may be due for services rendered.

These presents are therefore to command you, that of the goods and chattels, if sufficient,—if not, then of the lands and tenements,—of the said , you levy and cause to be made by distress and sale, said sum of \$, in gold coin of the United States, fees due as aforesaid, together with all costs that may accrue. And of this writ make legal service and return in days.

Given under my hand and seal, this day of , 19 .

[Seal.] , Clerk.

By , Deputy Clerk.

[Endorsements on the foregoing writ:]

Clerk's fees as follows:

This writ\$

Satisfaction\$

Total\$

[Filing endorsement.]

FORM No. 1209—Writ of execution. (On certified abstract of judgment of justice's court.)

[Title of court and cause.]

The people of the state of to the sheriff of the county of , greeting:

Whereas, on the day of , 19 , plaintiff, recovered a judgment in the court of , a justice of the peace in and for township, county of , state of , against , for the sum of \$ damages, with interest at the rate of per cent per until paid, together with \$, costs and disbursements, at the date of said judgment, and accruing costs amounting to the sum of \$, as appears to us of record;

And whereas, a duly certified abstract of said judgment was on the day of , 19 , filed in the clerk's office of said court, in the county of , and the said judgment was docketed in said clerk's office in the said county, on the day and year last above written:

And the sum of \$, with interest at , is now at the date of this writ actually due on said judgment;

Now, you, the said sheriff, are hereby required to make the said

sums due on the said judgment for damages, with interest as aforesaid, and costs and accruing costs, to satisfy the said judgment, out of the personal property of the said debtor , or, if sufficient personal property of said debtor can not be found, then out of the real property in your county belonging to , the said debtor, on the day whereon said judgment was docketed in the aforesaid county, or at any time thereafter. And make return of this writ within days, with what you have done endorsed hereon.

Witness the Hon. , judge of the superior court of the county of , state of , at the courthouse in said county of , this day of , 19 .

Attest my hand and the seal of said court, the day and year last above written.

[Seal.]

, Clerk.

By , Deputy Clerk.

[Endorsement of filing and of name of attorney obtaining writ.]

FORM No. 1210—Writ of execution for deficiency on foreclosure.

[Title of court and cause.]

The people of the state of to the sheriff of the county of , greeting:

Whereas, on the day of , 19 , plaintiff recovered a judgment in the said superior court of the county of , state of , against , for the foreclosure of a certain mortgage, and the sale of the mortgaged premises in said judgment described, to satisfy the sum found due to the plaintiff for principal and interest, to wit, the sum of \$, with interest from the date of said judgment at the rate of per cent per annum till paid, together with the costs and expenses of sale, as appears to us of record, in obedience to which judgment the said sheriff sold the said mortgaged premises and applied the proceeds of sale as therein directed, and has made his return unto said court; that there is a deficiency of such proceeds of sale, and that there is still due to the plaintiff the sum of \$, bearing interest at the rate of per cent per annum from the day of , 19 , the date of said return;

And whereas, the judgment-roll in the action in which said judgment was entered is filed in the clerk's office, in the said court, in the county of , and said balance or deficiency, on the

Whereas, a judgment was rendered on the day of , 19 ,
in the court, in an action in said court wherein

was plaintiff, and , as executor of the will [or as the administrator of, etc.] of , deceased, [or insert other description of the capacity in which the property is held,] was defendant, in favor of said plaintiff and against said defendant, as such executor [or administrator] as aforesaid, for the sum of \$ and costs, upon which judgment the sum of \$, with interest thereon from the day of , 19 , is now actually due;

[And whereas, an order of the probate (or surrogate) of the county of , from whose court the letters testamentary under said will (or the letters of administration upon said estate) were issued, has been duly made, permitting execution to be issued upon said judgment for the sum of \$.]

And whereas, the judgment-roll upon said judgment was filed in the clerk's office of the county of , on the day of , 19 , and a transcript of said judgment was filed, and said judgment was duly docketed, in the office of the clerk of your county on the day of , 19 :

Now, therefore, you are hereby required to satisfy the said amount of \$ out of the personal [or real, or real and personal] property of the said , in the hands of said , as such executor [or as such administrator], in your county; and that you return this execution to the clerk of the county of , within days [stating the number of days under the particular statute] after the receipt hereof.

Witness the Hon. , one of the justices [or judges] of said court, at , on this day of , 19 .

[Endorsements, etc., as in form No. 1210.]

FORM No. 1212—Execution upon writ of restitution.

[Title of court and cause.]

The people of the state of to the sheriff of County, greeting:

Whereas, a judgment was rendered in the superior court of the county of , at the courthouse thereof, on the day of , 19 , against , in favor of , for the possession of certain premises described therein, and also for the sum of \$ damages, and the sum of \$ costs of suit:

Now, therefore, these are to command you, that you place the said _____ in quiet and peaceable possession of the said premises described in said judgment, as follows, to wit: [Here describe.]

And these are further to command you, that of the goods and chattels, if sufficient,—if not, then of the lands and tenements,—of the said [naming the judgment debtor] you levy and cause to be made by distress and sale the said sum of \$ damages as aforesaid, and the said sum of \$ costs; also, together with all costs that may accrue. And of this writ make legal service and return on the day after your receipt hereof.

Witness the Hon. _____, judge of the superior court of the county
of _____, in said state, this _____ day of _____, 19 ____.

[Seal.]

, Clerk.

By

, Deputy Clerk.

[Endorsement of filing on return of writ.]

FORM No. 1213—Writ of execution after remittitur filed.

[Title of court and cause.]

The people of the state of _____ to the sheriff of the county
of _____, greeting:

Whereas, on the _____ day of _____, 19____, the supreme court
of the state of _____ rendered a judgment in said court on the
case of _____ v. _____, on appeal from the superior court of
the county of _____, in favor of said _____, and the remittitur
from said supreme court having been filed with the clerk of said
superior court, and said _____ having filed in this court his
memorandum of his costs of said appeal, duly verified, amounting to
the sum of \$ _____, in United States gold coin, and accruing costs,
amounting to the sum of \$ _____, in like gold coin, as appears to us
of record; and whereas, the sum of \$ _____ costs, and \$ _____,
accruing costs, as aforesaid, is now at this date actually due on said
judgment, amounting in all to \$ _____:

Now, you, the said sheriff, are hereby required to make the said sums due on said judgment, and said costs and accruing costs, to satisfy the said judgment, out of the personal property of the said debtor [here naming him] ; or, if sufficient personal property of said debtor can not be found, then out of the real property in your county

Witness the Hon. _____, judge of the superior court of the county
of _____, state of _____, and the seal of the court, this _____ day
of _____, 19 ____.

[Seal.] _____, Clerk.
By _____, Deputy Clerk.

[Endorsement on the foregoing writ:]

Memorandum of costs:

Accrued costs\$
This writ\$
Docketing and filing\$
Satisfaction\$
Total clerk's fees.\$

Attest:

_____, Clerk.
By _____, Deputy Clerk.

[Endorsement of filing on return of writ.]

**§ 499. ELEMENTS OF PETITION FOR AN ORDER REQUIRING DEBTOR
OF A JUDGMENT DEBTOR TO APPEAR AND ANSWER.**

[Title of court and cause.]

1. Introductory part.

2. Statement of proceedings in the action between the petitioner
and judgment debtor, and allegation as to judgment given and made
against said judgment debtor and in favor of the petitioner.

3. Issuance of execution to sheriff, and return thereof unsatisfied
in whole or in part, as the case may be.

4. Averment that _____ is a debtor of said judgment debtor,
and prayer that such alleged debtor may be cited to appear before a
judge or referee, at a time and place certain, to answer before such
judge or referee concerning any debt due from him, said debtor, to
said judgment debtor; and prayer that such debts when discovered
and properly levied upon may be applied to the satisfaction of said
judgment.

5. Concluding part.

§ 500. ANNOTATIONS.—Costs, executions, and writs.

1. Costs.—Statutory limitation of right.
2. What statute governs.
3. Costs in equity cases.
4. In divorce.
5. In foreclosure.
6. Costs where partial relief is granted.
7. In action for trespass.
8. Counsel fees as costs.
9. Costs where action abates.
10. Statutory costs.
11. Unliquidated demands.
12. Costs under attachment.
- 13, 14. Counterclaim as affecting costs.
15. Premature filing of cost-bill.
16. Filing after statutory time.
17. Effect of modification or reversal.
18. Writs.—Common-law practice.
- 19, 20. Definitions of "writ" and "process."
21. Discharge of improper writs.—Reference.
22. Writ of assistance.—Nature of.
23. Writ as summary proceeding.
24. Operation of writ.
25. Writ in foreclosure.
26. Writ of restitution upon judgment in ejectment.
27. Remedy of party removed under writ.
28. Restoring to possession after reversal of judgment.
29. Tenants who may be dispossessed under writ.
30. Once of writ coram nobis.

1. **COSTS.** — Statutory limitation of right.—The only limitation upon the right of a prevailing party in the superior court to recover the costs incurred, whether recovery be for a whole or a portion of the claim, or whether the claim be made up of one or several causes of action, is that he shall recover \$300 or over. Right to recover the costs is purely statutory, and in absence of the statute no costs could be recovered by either party: *Fox v. Hale & Norcross S. Min. Co.*, 122 Cal. 219, 223, 54 Pac. 73. (Under the California code, the minimum amount of such court's jurisdiction being the sum of \$300.)

2. **What statute governs.**—Right to recover costs is purely statutory, and their recovery is governed by the statute in force at the time the right to have them taxed occurs: *Begbie v. Begbie*, 128 Cal. 154, 155, 60 Pac. 667, 49 L. R. A. 141; *Williams v. Atchison etc. R. Co.*, 156 Cal. 140, 141, 103 Pac. 885.

3. **Costs in equity cases.**—In equity cases the allowance of costs is within the discretion of court, and such discretion will not be reviewed by the ap-

ellate court in absence of the statement or bill of exceptions: *Faulkner v. Hendy*, 108 Cal. 15, 26, 36 Pac. 1021.

4. **In divorce** the costs rest in the discretion of the court: *Brenot v. Brenot*, 102 Cal. 294, 296, 36 Pac. 672.

5. **In foreclosure.**—An action of foreclosure being equitable, allowance of the costs is in the discretion of the court: *Irvine v. Perry*, 119 Cal. 352, 357, 51 Pac. 554, 949.

6. **Costs where partial relief is granted.**—Allowance of costs does not depend upon the form or nature of the action, but rather upon the fact whether the case comes within the terms of the statute. Under this principle, in an action to quiet title, if the plaintiff recover as to any part of the property involved, and judgment runs to the defendant for the remainder, the plaintiff is entitled to costs: *Sierra Union W. & M. Co. v. Wolff*, 144 Cal. 430, 433, 77 Pac. 1038.

7. **In action for trespass.**—In an action to recover damages for trespass on real property, coupled with a prayer for injunction to restrain commission of threatened waste, equitable awarding

of the costs is not controlled by the amount of damages recovered: *Bemmerly v. Smith*, 136 Cal. 5, 6, 68 Pac. 97.

8. Counsel fees as costs are not recoverable by a successful party in an action at law or in equity, except where expressly allowed by the statute: *Estate of Olmstead*, 120 Cal. 447, 453, 52 Pac. 804. See *Miller v. Kehoe*, 107 Cal. 340, 40 Pac. 485; *Bates v. Santa Barbara County*, 90 Cal. 543, 27 Pac. 438.

9. Costs where action abates.—Costs are but a part and incident of the judgment. They can not be recovered until a judicial determination is had of the action in which they have been incurred, and if the action abate and the court loses power to render judgment between the parties upon issues before it, it is equally powerless to render judgment for the costs incurred therein. When an action abates by the death of a party, there can be no judgment for costs in favor of the survivor: *Begbie v. Begbie*, 128 Cal. 154, 155, 60 Pac. 667, 49 L. R. A. 141.

10. Statutory costs in each of the consolidated cases may be recovered notwithstanding the consolidation: *Gray's Harbor Boom Co. v. McAmman*, 21 Wash. 465, 58 Pac. 573.

11. Unliquidated demands.—Costs in an action upon an unliquidated demand, which defendant pleaded and was entitled to use as a set-off, are recoverable by the plaintiff in a subsequent action where the defendant denied the claim of the plaintiff and put him to the expense of establishing it: *Milner v. Camden Lumber Co.*, 74 Ark. 224, 226, 85 S. W. 234.

12. Costs under attachment.—Costs under a valid attachment are secured by the lien of the attachment the same as the original debt: *Bories v. Union B. & L. Assn.*, 141 Cal. 79, 74 Pac. 554.

13. Counterclaim as affecting costs.—In action upon a money demand, where one defendant files a counterclaim, and the plaintiff fails to recover against him, but recovers against a co-defendant, and the defendant interposing the counterclaim fails to recover thereon, judgment against him for the costs is erroneous. In such a case the court is allowed no discretion, the question being settled by statute (Cal. C. C. P. § 1024). If may be that the costs were nearly all incurred in defending against the counterclaim, but even then statute

does not authorize the court, where plaintiff fails to recover, to charge the defendant with any part of the costs: *Benson v. Braun*, 134 Cal. 41, 42, 66 Pac. 1.

14. The defendant is entitled to recover his costs in the action for money or the damages where judgment is in his favor, and it does not change the rule that judgment be in his favor on counterclaim for a nominal sum: *Davis v. Hurgren*, 125 Cal. 48, 49, 57 Pac. 634.

15. Premature filing of cost-bill.—The cost-bill filed before the filing of findings is premature, and will be stricken out on motion: *Sellick v. DeCarlow*, 95 Cal. 644, 645, 20 Pac. 795.

16. Filing after statutory time.—It is a settled rule in California that if the party entitled to costs neglects to serve and file his memorandum thereof until more than five days have elapsed after he has knowledge of decision of court, though no notice of it has been served upon him, the filing will be too late, and the costs will be stricken out on motion: *Dow v. Ross*, 90 Cal. 562, 563, 27 Pac. 409. See *Mallory v. See*, 129 Cal. 356, 360, 61 Pac. 1123.

17. Effect of modification or reversal.—Where, in the exercise of its discretion in allowing the costs in equity cases, the court taxes against each party the cost of maintaining certain issues, upon reversal of judgment upon one of such issues the costs should be retaxed accordingly: *Barthgate v. Irvine*, 126 Cal. 135, 143, 58 Pac. 442, 77 Am. St. Rep. 158.

18. WRITS.—Common-law practice. Under the old English practice, there were two classes of writs,—original and judicial. The original writ was a mandate of the court constituting the foundation of the action and the commencement of a legal proceeding. It was served upon the person named in the writ, and required his appearance in court, or the performance of some act designated by the writ. Writs that were issued after the action was commenced were designated judicial writs, and were only issued out of the court in which the action was pending, or which issued the original writ: *In re Damon*, 104 Fed. 775, 777.

(Under the code system, the purpose of the original writ as defined above is served by summons or citation, while subsequent processes, comparable to ju-

dicial writs under the common law, are variously designated as orders, citations, processes, or writs as the particular necessity demands.) For the various kinds of writs, see ch. CXLII, forms Nos. 1204-1214.

19. Definitions of "writ" and "process."—Under the Code of Civil Procedure of the state of California (§ 17, sub. 6), the word "writ" signifies an order or precept in writing, issued in the name of the people, or of a court or judicial officer; and the word "process" a writ or summons issued in the course of judicial proceedings.

20. A writ is defined as "an order or precept in writing, issued by a court, clerk, or judicial officer": *Gowdy v. Sanders*, 88 Ky. 346, 347, quoting and construing subdivision 27 of § 732 of the Civil Code of Practice.

21. Discharge of improper or irregular issuance of writs generally: See *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741; *Sparks v. Bell*, 137 Cal. 415, 70 Pac. 281.

22. Writ of assistance.—Nature of.—A writ of assistance is a summary proceeding resorted to under the rules of chancery practice to give effect to the decree, and presupposes that the rights of the parties are only such as follow upon the decree and the sale had pursuant thereto. If those rights have been changed by reason of an agreement subsequently entered into, so that the issuance of the writ might work injustice, it should be withheld: *San Jose v. Fulton*, 45 Cal. 316, 319.

23. Writ as summary proceeding.—A writ of assistance is a summary proceeding which a plaintiff may sometimes advantageously avail himself of, but is not *res adjudicata* as to any questions which may arise, and a right to the writ does not deprive a party of the fuller remedy afforded by an ordinary action: *Trope v. Kerns*, 83 Cal. 553, 23 Pac. 691.

24. Operation of writ.—A writ of assistance relates back to and operates upon those rights only which have been determined by the judgment: *Kirsch v. Kirsch*, 113 Cal. 56, 62, 45 Pac. 164.

25. Writ in foreclosure.—Writ of assistance is a proper remedy to place a mortgagee who has purchased under foreclosure sale in possession under his deed; it runs against the mortgagor and all persons who have purchased the fee under him *pendente lite* with notice:

Hibernia Sav. & L. Soc. v. Lewis, 117 Cal. 577, 580, 47 Pac. 602, 49 Pac. 714. See *Montgomery v. Tutt*, 11 Cal. 190; *Skinner v. Beatty*, 16 Cal. 156; *Montgomery v. Middlemiss*, 21 Cal. 103, 81 Am. Dec. 146; *Frisbie v. Fogarty*, 34 Cal. 11; *Newmark v. Chapman*, 53 Cal. 557; *Sichler v. Look*, 93 Cal. 600, 29 Pac. 220.

26. Writ of restitution upon judgment in ejectment.—A writ of restitution may be issued on a judgment in ejectment after the death of the plaintiff, if the judgment was rendered in his lifetime, at the instance and for the benefit of his successor in interest; and if issued and served in the name of the deceased plaintiff, although irregular in point of procedure, if it is correct in substance, defendants will not be restored to possession: *Franklin v. Merida*, 50 Cal. 289, 293.

27. Remedy of party removed under writ.—A party removed from the possession of real estate under a writ of restitution issued on a judgment in ejectment who moves to be restored to possession on the ground that he was not a party to the action must make out a clear case, and one free from ambiguity: *California Q. S. M. Co. v. Redington*, 50 Cal. 160, 161.

A person wrongfully turned out of possession of land, under a writ of restitution will be restored by the court to the possession on motion: *South Beach L. Assn. v. Bergle*, 41 Cal. 501, 504.

28. Restoring to possession after reversal of judgment.—Where plaintiff is placed in possession under judgment of forcible entry and detainer by a writ of restitution, and judgment is afterwards reversed by the supreme court, the court below should restore the defendant to possession: *Polack v. Shafer*, 46 Cal. 270, 277; *Pico v. Cuyas*, 48 Cal. 639, 642.

29. Tenants who may be dispossessed under writ.—Persons not parties to a suit, and in possession before it was brought, or those claiming under them, could not be ousted of their possession by writ of restitution; but it is otherwise of tenants coming in under the landlord pending the suit: *Sampson v. Ohleyer*, 22 Cal. 200, 207.

30. Office of the writ of *coram nobis* is to bring the attention of the court to, and obtain relief from, errors of fact, such as the death of either party pending the suit and before judgment there-

in, or infancy, where the party is not properly represented by guardian, or coverture, where the common law disability still exists, or insanity, it seems, at the time of the trial, or a valid defense existing in the facts of the case, but which, without negligence on the part of the defendant, was not made,

either through duress or fraud or excusable mistake; these facts not appearing on the face of the record, and being such as, if known in season, would have prevented the rendition and entry of the judgment questioned: *State v. Riley*, 219 Mo. 667, 118 S. W. 647, 651, quoting from 5 Ency. Pl. & Pr. 26, 27.

CHAPTER CXLIII.

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§ 501. NEW TRIALS.

FORM No. 1215—Notice of intention to move for new trial.

[Title of court and cause.]

To the plaintiff herein, and to A. B., his attorney:

You will please take notice, that the defendant in the above-entitled action intends to move the above-mentioned court to set aside the findings and decision in said action, and that a new trial therein be granted and had.

Said motion will be made upon the grounds, to wit: [Here state the grounds upon which the motion will be based.]

Said motion will be made upon a statement of the case [or a bill of exceptions], hereafter to be prepared, [or upon the minutes of the court, or otherwise, as the statute may provide].

[Date.]

C. D., Attorney for defendant.

FORM No. 1216—Notice of intention to move for a new trial, specifying grounds.

(In *Braly v. Fresno City R. Co.*, 9 Cal. App. 417; 99 Pac. 400.)

[Title of court and cause.]

You will please take notice, that the defendant in the above-entitled action intends to, and will, move this court to set aside and vacate the verdict of the jury in this action and to grant a new trial thereof.

The said motion will be made on the following grounds and for the following causes, to wit:

1. Insufficiency of the evidence to justify the verdict of the jury.
2. That said verdict of the jury is against law.
3. Errors in law occurring at the trial and excepted to by the defendant.

The said motion will be made upon a statement of the case hereafter to be prepared, certified, allowed, settled, and filed.

Dated April 21, 1907.

Everts & Ewing,

F. E. Cook,

Attorneys for defendant.

To said plaintiff, and to L. L. Cory and M. K. Harris, attorneys for plaintiff.

[Admission of service.]

Due service of the foregoing notice and receipt of a copy thereof are hereby acknowledged, this 20th day of April, 1907.

L. L. Cory, and

M. K. Harris,

Attorneys for plaintiff.

FORM No. 1217—Notice of presentation of bill of exceptions for settlement.

[Title of court and cause.]

You are hereby notified, that the defendant will, on the day of
 , 19 , at o'clock M., present to the Hon. ,
judge of said court, at his chambers, defendant's proposed bill of
exceptions, and plaintiff's proposed amendments thereto, for settle-
ment and allowance.

C. D., Attorney for defendant.

To A. B., Attorney for plaintiff.

FORM No. 1218—Minute order denying motion for new trial.

(In *Noyes v. Schlegel*, 9 Cal. App. 516; 99 Pac. 726.)

[Title of court and cause.]

June 12, 1908.

In this cause the defendant, L. Schlegel, moved for a new trial on the following grounds, to wit: [Here the grounds are stated.]

Said motion was submitted for ruling thereon by the court; wherefore, it is ordered that the motion for a new trial be and the same is hereby denied.

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dismissing the motion of the defendant for a new trial in the above-entitled action, and also the defendant's proposed statement on motion for a new trial, a true copy of which order is hereby annexed.

Bell, York & Bell,
Attorneys for the defendant.

[Copy of order annexed, as same appears in form No. 1222.]

Form of statement upon motion for a new trial: *Harris v. Kellogg*, 117 Cal. 484, 49 Pac. 708.

§ 502. APPEALS [AND WRITS OF ERROR] IN STATE COURTS.

[References to Statutes.]

Alaska: Appeals and writs of error generally, Ann. Code C. C. P. 1907 (Carter), § 504 et seq.; laws regulating appeals and writs of error are generally the same as those obtaining in the federal courts, § 508.

Arizona: Appeals and writs of error generally, Rev. Stats. 1901, ¶ 1493 et seq.; petition for writ of error, ¶ 1499; bonds, ¶¶ 1501, 1506; supersedeas, ¶¶ 1510-1513; summons in error, ¶ 1502.

Arkansas: Appeals and writs of error generally, Dig. of Stats. 1904 (Kirby), §§ 1189-1201; parties, § 1202 et seq.; supersedeas, §§ 1216-1221; trial and determination, §§ 1223-1242.

California: Appeals in general, C. C. P. § 936 et seq.; notice, § 940; undertakings, §§ 941-945; alternative method of appeals, §§ 941a-941c; stay of proceedings, §§ 946, 949; undertakings in one instrument, § 947; papers on appeal, § 950 et seq.; hearing and determination, § 954 et seq.; appeals to supreme and district courts of appeal generally, code amendments C. C. P. 1880, p. 14, adding new chapters, superseding chapter II, part II, title XIII, as the same appears in the published codes.

Colorado: Appeals to supreme court generally, Rev. Stats. 1908, §§ 422, 441; bond, §§ 422, 430; supersedeas, § 437; scire facias, §§ 439, 440.

Hawaii: Appeals and error generally, § 1858 et seq.; bonds, § 1859; arrest of judgment, § 1861; writ of error, § 1874; cost bond upon writ of error, § 1876; form of writ of error, § 1879, as follows:

property, § 1729; undertaking to stay proceedings, § 1730; several undertakings in one instrument, § 1731.

Nebraska: Petition in error, Comp. Stats. Ann. 1907, § 7156; summons in error, § 7157; stay of execution and undertakings, §§ 7164-7167, 7169; proceedings in district courts to vacate or modify judgments in such courts, §§ 7179-7188; security for costs, §§ 7189-7193.

Nevada: Appeals in general, Comp. Laws (Cutting), § 3422 et seq.; notice, § 3426; statement on appeal, §§ 3427-3431; appeals on affidavit, § 3432; undertakings, §§ 3436-3441; undertakings one or several, § 3442; affidavit of sureties to undertaking, § 3443.

New Mexico: Appeals generally, Comp. Laws 1897, § 3136 et seq.; trials de novo on appeal, § 2897; writs of error, §§ 3144, 3146; bond, §§ 3144, 3145; record on appeal, § 3147.

North Dakota: Appeals generally, Rev. Stats. 1905, § 7202 et seq.; notice, § 7205; deposit, § 7207; undertaking, § 7208; stay of proceedings, §§ 7209, 7210; stay of execution, §§ 7211-7213; intermediate orders, § 7216, 7226; undertakings as to appeals from orders on provisional remedies, § 7217; sureties, § 7221.

Oklahoma: Error in civil cases generally, Comp. Laws 1900 (Snyder), § 6066 et seq.; case-made, §§ 6073-6077; stay of execution §§ 6078-6081; stay on judgment or order, §§ 6083, 6084.

Oregon: Appeal generally, Codes & Stats. 1902 (Bel. & Cot.), § 547 et seq.; undertaking, §§ 550-552; transcript, §§ 553, 554.

South Dakota: Appeals generally, Rev. C. C. P. 1903, § 439 et seq.; notice, § 441; deposit in lieu of undertaking, § 444; undertaking, § 445; stay of execution, § 446; stay of proceedings on certain classes of judgments, §§ 447-452; appeals from intermediate orders, § 453; undertaking on appeals from provisional orders, §§ 454, 455; undertakings in one instrument, § 457; review and determination, §§ 462-465.

Texas: Writ of error generally, Civ. Stats. 1897 (Sayles), Art. 1391; error bond, § 1393; citation in error, § 1394; form of citation, § 1394; return of citation in error, § 1395; cost bond on appeal, § 1400; supersedeas bonds, §§ 1404, 1405.

Utah: Appeals in general, Comp. Laws 1907, § 3300 et seq.; notice, § 3305; undertakings, §§ 3306-3312x; stay of proceedings, §§ 3313-3315; perfecting of appeal, hearing, and disposition, §§ 3316-3322.

FORM No. 1226—Notice of appeal from part of a judgment.

[Title of trial court and cause, naming all parties.]

To A. B., attorney for plaintiff, and to L. M., clerk of the aforesaid court:

Please take notice, that _____, defendant above named, hereby appeals to the supreme court of the state of _____ from that part of the judgment rendered by the above-named court, and herein entered, on the _____ day of _____, 19____, in favor of the plaintiff and against this defendant, which adjudges that [here specify the part of the judgment appealed from].

[Date.]

C. D., Attorney for defendant.

[Admission or proof of service annexed.]

FORM No. 1227—Notice of appeal from judgment and order denying motion for new trial.

(In *Stimson M. Co. v. Hughes M. Co.*, 8 Cal. App. 559; 97 Pac. 322.)

[Title of court and cause.]

To the defendant in the above-entitled action, and to its attorney, George P. Adams, and to the clerk of said court:

Please take notice, that the plaintiff in the above-entitled action hereby appeals to the district court of appeals of the third appellate district of the state of California from the judgment made and entered in the superior court in said cause on October 3, 1906, and from the whole of said judgment, and also from the order made and entered by the said superior court on December 31, 1906, denying the plaintiff's motion for a new trial.

Dated January 28, 1907.

Scarborough & Bowen,
Attorneys for plaintiff.

[Admission of receipt of copy of notice.]

Received copy of the within notice this 28th day of January, 1907.
George B. Adams,
Attorney for defendant.

FORM No. 1228—Notice of appeal from judgment granting insufficient relief.

(In *Kiger v. McCarthy Co.*, 10 Cal. App. 308; 101 Pac. 928.)

[Title of court and cause.]

To the clerk of the above-entitled court, and to Clifton Axtell and Edward L. Payne, Esqs., attorneys for the above-named defendant:

defendant [or plaintiff], and from the whole thereof. This appeal is taken on questions of both law and fact.

To the justice of said justices' court, and to C. D., attorney for respondent.

[Date.]

A. B., Attorney for appellant.

FORM No. 1231—Acknowledgment of service of notice of appeal.

[Title of court and cause.]

Due service of the foregoing notice of appeal is hereby admitted, and receipt of a copy thereof acknowledged, this day of , 19 .
C. D., Attorney for respondent.

FORM No. 1232—Affidavit of mailing notice of appeal.

(In *Merced Bank v. Price*, 9 Cal. App. 177; 98 Pac. 383.)

State of California, }
County of Mariposa. } ss.

J. S. Larew, being first duly sworn, deposes and says: That he is an attorney at law, and one of the attorneys for defendants in the within-entitled action; that he resides in Mariposa County, state of California, and has his office in the town of Mariposa, in said Mariposa County; that J. W. Knox is the attorney of record for the within-named plaintiff in said action, and that he, the said J. W. Knox, resides in the town of Merced, state of California, and has his office in the said town of Merced; that in each of said towns above mentioned there is a United States post-office, and between said towns there is a regular daily communication by mail; that on the first day of March, 1907, deponent served the within notice of appeal on the said J. W. Knox, the said attorney for plaintiff, by depositing a true copy of said notice of appeal, on said date, in the United States post-office in said town of Mariposa, properly enclosed in a sealed envelope addressed to said J. W. Knox, attorney at law, Merced, California, and prepaying the postage thereon.

J. S. Larew.

Subscribed and sworn to before me, this 1st day of March, 1907.

[Seal.]

John M. Corcoran,

Notary Public [etc.].

FORM No. 1235—Acknowledgment of undertaking. (Under statutes requiring acknowledgment.)

[Venne.]

On this day of , 19 , before the undersigned, a notary public in and for said county and state, personally appeared A. B., and C. D., known to me to be the persons who executed the within and foregoing instrument, and acknowledged to me that they executed the same as their free act and deed. [Or, otherwise, setting forth the words of the statute relating to the form or substance of acknowledgments.]

[Seal.]

E. F., Notary Public.

FORM No. 1236—Undertaking by surety corporation.

[Title of action in trial court.]

[After preliminary matter, designating the judgment, etc., as in the particular case required, continue as follows:]

Now, therefore, in consideration of the premises, the undersigned [naming the corporation], a corporation duly organized and doing business under and by virtue of the laws of the state of , and duly licensed therein for the purposes of making, guaranteeing, and becoming sole surety upon bonds and undertakings, does hereby undertake [etc., as in form No. 1233, for costs; or as in form No. 1237, where stay of execution is asked, etc.].

[Date.]

S. D. Co.

By , Attorney in fact
[or other authorized officer].

Attest: By , Agent.

[Acknowledgment by the officers executing as such.]

Under the statutes, the qualifying of a surety company before a license is issued generally serves in lieu of justification upon each particular bond.

FORM No. 1237—Undertaking on appeal, to stay execution of money judgment.

[Title of court and cause.]

Whereas, in the above-entitled action appealed to the supreme court of the state of from a judgment [or designating an appealable order] made and entered against in said action, in the said superior court, in favor of the in said action, on the day of , 19 , for [here state amount for which judgment was rendered, etc.], costs of suit and :

FORM No. 1239—Undertaking where judgment directs delivery of documents or other personal property.

[Title of action in trial court.]

[Proceed as in form No. 1233 to the star (*) and continue:] wherein it was adjudged that the said defendant assign [or deliver] to the plaintiff certain documents in said judgment described [or deliver to the plaintiff certain personal property in said judgment described], and recover the sum of \$; and the said defendant, being aggrieved thereby, intends to appeal to the supreme court of the state of :

Now, therefore, we, A. B. and C. D., of , in the said county of , do hereby undertake that the said appellant will pay all costs and damages [or charges, where so worded by statute] which may be awarded against him on said appeal, not exceeding \$; and do also further undertake in the sum of \$ [being the statutory amount, or the amount directed by the judge of said court] that the appellant will obey the order of the appellate court on the appeal.

[Date.]

A. B.

C. D.

[Acknowledgment, if required, and justification of sureties as in form No. 1234.]

FORM No. 1240—Undertaking where judgment directs sale or delivery of real property.

[Title of action in trial court.]

[Proceed as in form No. 1233 to the star (*) and continue:] wherein the sale [or delivery of the possession] of certain real property therein described was directed and adjudged, and the defendant, feeling aggrieved thereby, intends to appeal to the supreme court of the state of :

Now, therefore, we, A. B. and C. D., both of , in the said county of , do hereby undertake that the said appellant will pay all costs that may be awarded against him on said appeal, not exceeding \$, and do also undertake, in the sum of \$, [being the amount as ascertained by statute, or the amount directed by the judge of said court,] that during the possession of such property by the appellant he will not commit or suffer to be committed any waste thereon, and that if the judgment be affirmed he will pay

county of aforesaid, before you, between M. N., plaintiff, and D. F., defendant, in an action of [here state briefly the nature of the action], manifest error hath intervened to the great damage of the said D. F., as by his complaint we are informed;

And being willing that the error, if any there be, should in due manner be corrected and full and speedy justice be done to the parties aforesaid:

We do command you, that if judgment be thereupon given, then you send to the judges of the supreme court of the state of , distinctly and openly, under your seal, with all convenient dispatch, a transcript of the record and proceedings of the suit aforesaid, with all things concerning the same, and this writ, so that they may have and return the same at the next term of our said supreme court, to be held at , in the state aforesaid, on the day of , 19 , that the record and proceedings aforesaid, being inspected, we may cause to be further done, for correcting such error, what of right and according to law and the rules of our said court ought to be done.

Witness the Hon. R. S., Chief Justice of the supreme court of the state of , at , this day of , 19 .

[Seal of court.] Attest:

T. N., Clerk.

FORM No. 1243—Bond for costs and damages on writ of error in civil action.

Know all men by these presents, that we, L. M., principal, and A. B. and C. D., sureties, all of , in the county of , and state of , are held and firmly bound to E. F., of , in the sum of \$250 [or other amount], lawful money of the United States, to be paid to the said E. F., his heirs, executors, administrators, or assigns, for which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of , 19 .

Whereas, the above-bounden L. M. has sued a writ of error out of the supreme court of the state of , directed to the judge of the circuit court for County, commanding that a transcript of the record in a certain action of [naming it], between E. F. and L. M., in said circuit court, wherein judgment was rendered against said L. M. on the day of , 19 , be sent to said supreme court:

Now, the condition hereof is such that if the said L. M. shall well

Now, therefore, you are hereby commanded and required to stay any and all proceedings in said cause under such judgment [or order], or so much thereof as is superseded thereby, from and after the date hereof and until said appeal is finally disposed of and determined.

Witness T. M., clerk of said court, with the seal thereof hereto affixed, this day of , 19 .

[Seal of court.]

T. M., Clerk of Court.

§ 505. PROCEEDINGS FOR WRIT OF ERROR TO THE SUPREME COURT OF THE UNITED STATES.

FORM No. 1246—Petition for writ of error.

In the Supreme Court in the state of .

[Title of cause.]

Comes now the above-named , appellant, and says: That on the day of , 19 , a judgment in this cause was entered by this court against , appellant, and thereafter a petition for rehearing was filed, presented, considered, and on the day of , 19 , denied by this court, whereupon said judgment became final; that said was and is aggrieved in that, in said judgment and the proceedings had prior thereto in this case, certain errors were committed to his prejudice; that this is an action brought under the statutes of the United States relating to [here designate the particular statute]; and that by this action there was drawn in question the construction of certain of said statutes, and the decision of this court is against said title and right claimed by the said , appellant, and, as he believes, contrary to the statutes of the United States, relating to [here designate the statutes], and the right of , appellant, thereunder, all of which will more fully appear in detail from the assignment of errors filed herein.

Wherefore, said prays that a writ of error may issue to the supreme court of the state of for the correcting of the errors complained of, and that a duly authenticated transcript of the record, proceedings, and papers herein may be sent to the United States supreme court.

A. B., Attorney for , appellant
[or plaintiff in error].

FORM No. 1249—Bond on a writ of error.

In the Supreme Court of the United States.

[Title of cause.]

Know all men by these presents, that I, _____, of the county of _____, state of _____, as principal, and we, _____ and _____, of the county of _____, state of _____, as sureties, are held and firmly bound unto the above-named _____ in the sum of \$2,000, to be paid to him, and for the payment of which well and truly to be made we bind ourselves, and each of us, our, and each of our, heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the _____ day of _____, 19 ____.

Whereas, the above-named _____, plaintiff in error, seeks to prosecute a writ of error in the supreme court of the United States to reverse the judgment rendered in the above-entitled action in the supreme court of _____:

Now, therefore, the condition of this obligation is such that if the above-named _____, plaintiff in error, shall prosecute his writ of error to effect, and accept all costs and damages that may be adjudged if he shall fail to make good his plea, then this obligation to be void; otherwise, to remain in full force and virtue.

[Signature of principal.] [Seal.]

[Signature of surety.] [Seal.]

[Signature of surety.] [Seal.]

FORM No. 1250—Oath of sureties to the foregoing bond.

State of _____, }
County of _____, } ss.

and _____, whose names are subscribed as sureties to the above bond, being severally and duly sworn, each for himself says: That he is a resident and freeholder of the state of _____, and is worth more than the sum in said bond specified as the penalty thereof over and above all his just debts and liabilities in property not by law exempt from execution in this state. [Or otherwise wording as the particular statute of the state where executed may provide.]

[Signatures of sureties.]

[Jurat.]

FORM No. 1253—Citation upon writ of error.

United States of America, ss.

To , greeting:

You are hereby cited and admonished to be and appear at a session of the supreme court of the United States, to be holden at Washington on the day of , 19 , pursuant to a writ of error filed in the clerk's office of the supreme court of the state of , wherein is plaintiff and you are defendant, to show cause, if any there be, why judgment in said writ of error mentioned should not be corrected and speedy justice be done to the parties in that behalf.

Witness the Hon. , Justice of the said Supreme Court of the United States, this day of , in the year of our Lord one thousand nine hundred and .

J. M. H., Associate Justice of the Supreme Court
of the United States.

Due service of a copy of the within citation is hereby admitted. on this the day of , 19 .

C. D., Attorney for defendant in error.

§ 506. MISCELLANEOUS ORDERS, STIPULATIONS, AND REMITTITUR.

FORM No. 1254—Order dispensing with undertaking on appeal from judgment or order denying new trial. (In probate.)

(Elizalde v. Elizalde, 137 Cal. 634; 66 Pac. 369; 70 Pac. 861.)

[Title of court and cause.]

Whereas, the above-entitled action was commenced against the defendant, Ernest Graves, in his representative capacity, as administrator of the estate of Marcus A. Elizalde, deceased; and whereas, a judgment was obtained in said action by the plaintiff against said defendant, Ernest Graves, as administrator; and whereas, said Ernest Graves is about to appeal from said judgment, and has filed and served his notice of appeal therefrom; and whereas, said defendant, Ernest Graves, as such administrator, has made a motion to this court for a new trial of said cause, and said motion has been this day denied; and whereas, said Ernest Graves, as such administrator, is about to appeal from the order of this court denying said motion for a new trial; and whereas, said appellant is acting in the right of another in said action, and in taking said appeal, and as administrator of said estate of Marcus A. Elizalde, deceased; and whereas,

FORM No. 1256—Waive

(From the record i
149 Cal. 429; 86 P
460; 9 Ann. Cas.

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FORM No. 1262—Provisional order affirming judgment on appeal.

(In Greve v. Echo Oil Co., 8 Cal. App. 275; 96 Pac. 904.)

[Title of court and cause.]

It is ordered, that if respondent shall within ten days after the filing of the remittitur in the trial court enter partial satisfaction of the judgment to the amount of \$90 as of the date of the entry of the judgment, the order and judgment shall stand affirmed; otherwise, the order and judgment are reversed; plaintiff to recover its costs of appeal.

[Date.]

S. T., Judge.

FORM No. 1263—Order of supreme court relating to exhibits.—Action to quiet title, and for value of rents and profits, and for restitution.

(In Gage v. Gunther, 136 Cal. 338; 68 Pac. 710; 89 Am. St. Rep. 141.)

[Title of court and cause.]

Upon reading the stipulation of the attorneys for appellants and respondents, and good cause appearing therefor:

It is hereby ordered by the court, that the copies of the transcript on appeal in the above-entitled cause from the judgment entered in said cause, and also from the order denying the motion of defendant O. H. Newall for a new trial of said cause, to be served on attorneys for respondents and filed in the office of the clerk of the supreme court (except one of the copies served on each of the attorneys for respondent), need not have attached thereto any of the exhibits referred to in the cross-complaint and in the bill of exceptions of defendant O. H. Newall on motion for new trial and on appeal from the judgment entered in the said cause, which consists of maps, diagrams, and photographs.

That one of said copies to be served on each of the attorneys for respondents shall contain duplicates of all such maps, diagrams, and photographs, similar to those inserted in the original certified transcript on appeal, and reference to said maps, diagrams, and photographs, as being in said original certified transcript shall be made in the other copies.

Dated July 23, 1900.

Beatty, C. J.

of the court herein is delivered by McFarland, J. We concur: Henshaw, J., Temple, J.

Whereupon, it is adjudged and decreed by the court that the judgment of the superior court in and for the county of Los Angeles in the above-entitled cause be and the same is hereby reversed, with direction to the court below to overrule the demurrer to the complaint, appellant to recover costs of appeal herein.

I, George W. Root, clerk of the supreme court of the state of California, do hereby certify that the foregoing is a true copy of an original judgment in the above-entitled cause made and rendered and entered on the 11th day of September, 1902, and now remaining of record in my office.

Witness my hand and the seal of the court, annexed at my office, this 13th day of October, A. D. 1902.

[Seal.]

George W. Root, Clerk.

By A. E. Hornlein, Deputy.

[Endorsement of filing, docketing, and entry upon the records of the trial court.]

Form of appeal bond on motion to dismiss the appeal for the reason the appeal bond is not in double the amount of the award: *Chicago etc. R. Co. v. Abilene Town-site Co.*, 42 Kan. 98, 21 Pac. 1112.

Form of appeal bond in an appeal from a judgment rendered by a justice of the peace of an unorganized county: *Smith v. Nescatunga Town Co.*, 36 Kan. 738, 14 Pac. 246.

Form of appeal bond where a motion to dismiss the appeal was made upon the ground that the appeal was not taken and perfected according to law: *Knight v. People*, 11 Colo. 309, 17 Pac. 902.

Form of undertakings on appeal where motion to dismiss appeal was made *Sharon v. Sharon*, 68 Cal. 329, 9 Pac. 187, 188.

Form of motion to dismiss an appeal upon the ground that the date of the judgment recited in the appeal bond did not correspond with the date on which the judgment was rendered: *Shuster v. Overturf*, 42 Kan. 669, 22 Pac. 718.

§ 507. ANNOTATIONS.—New trials and appeals.

1. New trial.—Grounds of motion must be specified.
2. Motion heard at subsequent term of court.
3. Perjury as ground for new trial.—Nebraska statute.
4. Effect of motion for new trial granted.
5. Appeal.—Grounds of motion on review.
- 6, 7. Order or judgment nunc pro tunc providing for answer to amendment.
8. Rule as to reversal of judgment for defects in complaint.
9. Motion to dismiss.—When should be overruled.
10. Order striking out pleading.
11. Order granting nonsuit.
12. Review of orders made upon motions.
13. Matters not considered on appeal from order.
- 14, 15. Sufficiency of complaint.—When not considered.
16. Petition when liberally construed on appeal.

lower court to cause an answer to an amendment to be filed in accordance with an order made at the trial, and as of the date when said order was made. The court on appeal may affirm the judgment and direct that the record be thus perfected upon the issues: *Cummings v. Roeth*, 10 Cal. App. 144, 101 Pac. 434, 438; *Alameda County v. Crocker*, 125 Cal. 101, 57 Pac. 766.

7. Failure to file an answer to an amendment to the complaint is not ground for reversal of the judgment. The record can still be corrected to conform with the order permitting the amendment: *Cummings v. Roeth*, 10 Cal. App. 144, 101 Pac. 434, 436; *French v. McCarthy*, 125 Cal. 508, 58 Pac. 154.

8. Rule as to reversal of judgment for defects in complaint.—Judgment will not be reversed for defects in the complaint which fall short of an entire absence of material and indispensable matter: *Hallock v. Jaudin*, 34 Cal. 167, 174.

9. Motion to dismiss.—When should be overruled.—A motion to dismiss an appeal on the ground that the same should have been preceded by a motion for new trial in the court below, will be overruled where the cause was submitted in the trial court on an agreed statement of facts. In such a case the motion for a new trial is unnecessary: *Nichols v. Trueman*, 80 Kan. 89, 101 Pac. 633, 634; *Atkins v. Nordyke-Marmon Co.*, 60 Kan. 354, 56 Pac. 533.

10. Order striking out a pleading is reviewable on an appeal from the judgment: *Clifford v. Adams*, 84 Cal. 528, 532, 24 Pac. 292; *Alpers v. Bliss*, 145 Cal. 565, 569, 79 Pac. 171.

11. Order granting a nonsuit may be reviewed on an appeal from the judgment based on such order, or on an order denying a new trial: *Converse v. Scott*, 137 Cal. 239, 244, 70 Pac. 13.

12. Review of orders made upon motions.—Where a specific kind of relief is sought by motion,—as, for example, where a party by motion seeks to set aside a judgment procured by fraud,—it is essential to present a review in the appellate court of the order made thereon, that the party against whom the order is directed preserve an exception at the time of the ruling, and exemplify the same to the appellate court by bill of exceptions duly filed. This rule obtains as a prerequisite to the right of

review of the appellate court, and arises out of the distinction made in the statutes between an appeal from a ruling on a motion and an appeal from a judgment or an order on a pleading; the motion itself not being a pleading in the strict meaning of that word: *Graff v. Dougherty*, 139 Mo. App. 56, 120 S. W. 661, 663; *City of St. Louis v. Brooks*, 107 Mo. 380, 384, 18 S. W. 22; *Ecton v. Kansas City etc. R. Co.*, 56 Mo. App. 337; *Corby v. Tracy*, 62 Mo. 511.

13. Matters not considered on appeal from order.—Questions relating to the sufficiency of a complaint, rulings upon demurrers, and the sufficiency of the findings to support the judgment can not be considered on an appeal from an order denying a motion for a new trial: *Great Western G. Co. v. Chambers*, 153 Cal. 307, 310, 95 Pac. 151, (for accounting); *Swift v. Occidental M. Co.*, 141 Cal. 161, 74 Pac. 700; *Holmes v. Warren*, 145 Cal. 457, 78 Pac. 954; *Brownlee v. Reiner*, 147 Cal. 641, 82 Pac. 324; *County Bank v. Jack*, 148 Cal. 437, 83 Pac. 705, 113 Am. St. Rep. 285; *Wheeler v. Bolton*, 92 Cal. 159, 28 Pac. 558; *Brison v. Brison*, 90 Cal. 323, 27 Pac. 186.

14. Sufficiency of complaint.—When not considered.—The appellate court will not consider the sufficiency of a complaint on an appeal from an order denying a new trial: *Naylor & Norlin v. Lewiston etc. El. R. Co.*, 14 Idaho 789, 96 Pac. 573, 575, (to foreclose lien for labor performed and materials furnished), citing *Swett v. Gray*, 141 Cal. 63, 74 Pac. 439; *Swift v. Occidental M. etc. Co.*, 141 Cal. 161, 74 Pac. 700; *Bode v. Lee*, 102 Cal. 583, 36 Pac. 936; *Alpers v. Hunt*, 86 Cal. 78, 24 Pac. 846, 9 L. R. A. 483, 21 Am. St. Rep. 17.

15. The sufficiency of the complaint will be considered only upon appeal from the judgment: *Naylor & Norlin v. Lewiston etc. El. R. Co.*, 14 Idaho 789, 96 Pac. 573, 575.

16. Petition when liberally construed on appeal.—After proof has been adduced on both sides of a controverted issue, and a final decree entered, the petition, when not assailed by motion or demurrer, should be liberally construed by the reviewing court and sustained, if the essential elements of the plaintiff's case may be implied from its terms by reasonable intendment: *Kimmerly v. McMichael*, 83 Neb. 789, 120 N. W. 487, 483, citing *Sorensen v. Sorensen*, 68 Neb. 483,

or order, etc. A third class, similar in purpose to the second class, under section 943 of the same code, is used to obtain a stay of execution in case of an appeal from a judgment or order directing the assignment or delivery of documents: For the distinctions between the classes of undertakings, see *Duffy v. Greenebaum*, 72 Cal. 157, 159, 12 Pac. 74, 13 Pac. 323; *Corcoran v. Desmond*, 71 Cal. 100, 104, 11 Pac. 815; *In re Schedel*, 69 Cal. 241, 243, 10 Pac. 234; *Owens v. Pomona L. & W. Co.*, 124 Cal. 331, 334, 57 Pac. 71.

27. **Non-appealable order.**—Striking out pleading.—An appeal does not generally lie from an order striking out a pleading: *Allen v. Church*, 101 Iowa 116, 70 N. W. 127; *Allen v. Cook* (Iowa), 71 N. W. 534; *Jordan Co. v. Sperry Bros.*, 141 Iowa 225, 119 N. W. 692, 693.

28. **Failure to answer.**—When deemed waived.—Where the plaintiff fails to take judgment against defendant upon failure of the defendant to file an answer, and goes to trial, the parties thereby treating the cause as if at issue; held, that the plaintiff can not take advantage on appeal of the failure to answer: *Ward v. Blythe* (Ark.), 122 S. W. 508; *Pembroke v. Logan*, 71 Ark. 364, 74 S. W. 297; *Cribbs v. Walker*, 74 Ark. 104, 85 S. W. 244.

29. **Deficiencies of complaint supplied by the answer.**—Where any deficiencies of the complaint are supplied by the allegations of the answer, and thereby all material issues are clearly presented by the pleadings, such defects can not be said to result in prejudice to the defendant in review on appeal: *Lowe v. Yolo County C. W. Co.*, 8 Cal. App. 167, 96 Pac. 379, 381.

30. **Trial de novo of equity case in supreme court.**—It has been the uniform ruling of the supreme court of the state of Washington in an equity case which is tried de novo in that court, that the case will be tried upon the testimony, and the pleadings will be considered amended to meet the requirements of the testimony. In equity cases, if evidence is introduced without objection which would entitle a party to relief, the decision would be based upon it, without regard to the pleadings, which are treated as amended: *Ness v. Bothell*, 53 Wash. 27, 101 Pac. 702, 703; *Davis v. Hinchcliffe*, 7 Wash. 199, 34 Pac. 915;

Cunningham v. Lakin, 50 Wash. 394, 97 Pac. 447.

31. **Decisions on all questions not required.**—The defendant is entitled to the decision of the appellate court, where an appeal is made from a judgment for defendant sustaining a demurrer, on all questions presented by the demurrer and necessary to the decision made: *Burke v. Maguire*, 154 Cal. 456, 98 Pac. 21, 23. See *White v. Merrill*, 82 Cal. 14, 22 Pac. 1129; *Wakeham v. Barker*, 82 Cal. 46, 22 Pac. 1131; *Wilson v. Carter*, 117 Cal. 53, 48 Pac. 983.

32. **Modification of judgment for excess.**—Where a judgment is rendered in the trial court for an amount in excess of the amount to which plaintiff is entitled, and no offer to remit is made in the court below, the appellate court, on appeal, may render such judgment as should have been rendered in the court below: *Duggan v. Cole*, 2 Tex. 381, 397.

33. **Transcript should contain notice of appeal.** *Woodside v. Hewel*, 107 Cal. 141, 143, 40 Pac. 103.

34. **Transcript not required to include the undertaking.**—The undertaking on appeal should not be embodied in the transcript on appeal: *San Francisco etc. R. Co.*, 77 Cal. 297, 298, 19 Pac. 517.

35. **Alternative method of appeal.**—California.—Under code provisions enacted in 1907 (Stats. 1907, p. 753), an alternative method of appeal was established under which the mere filing of a notice of appeal within a period specified is sufficient. This method of appeal has been passed upon in the following cases: *United Investment Co. v. Los Angeles Interurban R. Co.*, 10 Cal. App. 175, 179, 101 Pac. 543; *Ford & Sanborn v. Braslan Seed Growers' Co.*, 10 Cal. App. 762, 766, 103 Pac. 946; *Modoc Co-operative Association v. Porter*, 11 Cal. App. 270, 271, 104 Pac. 710; *Reclamation Dist. No. 70 v. Sherman*, 11 Cal. App. 399, 403, 105 Pac. 277, (in this latter case rule 7, as prescribed by the supreme court, is held applicable to appeals under the alternative method; for this rule, see 144 Cal. xlv, 78 Pac. ix); *John Brickell Co. v. Sutro*, 11 Cal. App. 460, 462, 105 Pac. 948, 949, (holding that service of the notice under this method of appeal is not required); *Estate of Brewer*, 156 Cal. 89, 91-93, 103 Pac. 486, (holding that this method is applicable to probate appeals); *Lane v.*

foregoing are full, true, and correct copies of the original records, proceedings, orders, and of the judgment, in an action [or proceeding] in said court in which A. B. is plaintiff [or petitioner] and C. D. is defendant [or respondent].

Witness my hand and the seal of said court, this day of
 , 19 .

[Seal.]

M. N., Clerk of [naming the court].

[Certificate as to genuineness of signature.]

I, S. T., presiding judge of [naming the court], certify that M. N., whose signature is annexed to the above certificate, was at the date thereof a clerk of the [name the court]; that said signature is genuine, and that the official acts and doings of M. N. as said clerk are entitled to full faith and credit; and I further certify that the foregoing attestation by said clerk is in due form.

Witness my hand, this day of , 19 .

S. T., Judge of [naming court].

FORM No. 1267—Authentication by copy of non-judicial records.

[Insert copy of record.]

State [or territory] of .
Office of Recorder [or registrar] of Deeds }
of the county of , in the state } ss.
[or territory] of .

I, X. Y., the recorder [or registrar] of deeds of said county of , in the state [or territory] of , certify that I am such recorder [or registrar], and, as such, the legal custodian of the records and office books kept in the office of the county recorder of the county of , in the state [territory] of ; that the foregoing is a full, true, and correct copy of the record in said office of a deed [or other instrument, stating what it is], and of the whole of the original records of such deed [or instrument, stating what it is] of record in my office as such county recorder.

Witness my hand [and seal of office, if there be such seal; if not, so state and certify], at , in said county of , in the state [or territory] of , this day of , 19 .

X. Y., Recorder [or registrar] of Deeds
of the county of , in the state
[or territory] of .

genuine signature appeared to the foregoing certificate, was, at the time of signing the same, one of the judges of the superior [or district] court of the state of , and county of , duly commissioned and qualified; that full faith and credit are, and of right ought to be, given to all his official acts, as such, in all courts of record and elsewhere.

In testimony whereof, I have hereunto set my hand, and affixed the seal of said court, at my office, this day of , 19 .

[Seal.]

D. E., Clerk.

FORM No. 1270—Authentication of copy of a judicial record.

[Insert copy of record.]

State of , }
County of . } ss.

I, D. E., clerk of [state the name of the court], certify that I am the legal custodian of the original records of [state name of court]; that the foregoing is a full, true, and correct copy of the original [designate the record by name] in the action [or proceeding] entitled [here give title].

In witness whereof, I have subscribed this certificate and affixed the seal of said court thereto at , this day of , 19 .

[Seal of court.]

D. E., Clerk of [name of court].

FORM No. 1271—Authentication of copy of a judicial record of a foreign country.

[Insert copy of record.]

[Name of state or country, etc.]

I, F. H., clerk of [state the name of court], certify that I am the legal custodian of the records of said court; that the foregoing is a full, true, and correct copy of the original record in said court [designate the particular record] in the action [or proceeding] entitled [here state].

In witness whereof, I have signed this certificate and have affixed the seal of said court thereto at , the day of , 19 .

[Seal of court.]

F. H., Clerk of [name of court].

M. N., the [giving name of office], who is the officer having the legal custody of the original thereof.

In witness whereof, I have hereunto set my hand and caused the great seal of the state [or territory] of _____ to be affixed, this day of _____, 19 ____.

[Great seal of state or territory.]

R. S.,
Secretary of State.

FORM No. 1273—Authentication of a document in the office of a department of the United States. (Annexed to copy of document.)

[Certificate of custodian.]

United States of America,
Office of [giving name of office]. } ss.

I. A. B., [giving name of office] certify that I am the legal custodian of the original [naming the document], and that the foregoing copy of [designating the original document], is a full, true, and correct copy of said original document.

A. B. [giving name of office].

FORM No. 1274—Authentication of a public record of a private writing. (Annexed to copy of record.)

[Certificate of recorder or registrar.]

Office of County Recorder [or registrar] }
in the county of _____, state of _____.

I, D. E., county recorder [or registrar] of the county of _____, in the state of _____, certify that the foregoing copy is a full, true, and correct copy of the original record in my office as such county recorder [or registrar] of a [giving the name of the private writing] and of the certificate of acknowledgment thereof. I certify that I am the legal keeper of such record.

[Date.]

D. E., County Recorder [or registrar] of the
county of _____, in the state of _____.

FORM No. 1275—Certified copy of order.

[Title of court.]

At a session of the _____ court, held at the courthouse in the county of _____, on the _____ day of _____, in the year 19 ____.

Present, Hon. _____, Superior Judge; _____, Clerk, and _____, Sheriff.

[Title of cause or proceeding.]

TITLE XVIII

Quasi-Civil Proceedings.

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CHAPTER CXLV.

Habeas Corpus Proceedings.

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FORM No. 1277—Petition for writ. (Common form.)

[Title of court.]

In the matter of the application of D. E. }
for a writ of habeas corpus. }

To the Hon. S. T., Judge of the Court of the state of , in
and for the county [or district] of :

The petition of L. M. respectfully shows: That D. E. is unlawfully imprisoned, detained, confined, and restrained of his liberty by ,
at , in the county of , state of ; that the said imprisonment, detention, confinement, and restraint are illegal; that the illegality thereof consists in this: [Here specify sufficient of the facts to show the illegality, etc., of the imprisonment.]

Wherefore, your petitioner prays: That a writ of habeas corpus may be granted, directed to the said , sheriff [or other person] as aforesaid, commanding him to have the body of said D. E. before your honor at a time and place therein to be specified, to do and receive what shall then and there be considered by your honor

(1944)

ered concerning the said , and that you notify . And have you then and there this writ.

Witness the Hon. , judge of the said superior court of said county, this day of , 19 .

Attest my hand and the seal of said court, the day and year last above written. , Clerk.

[Seal.] By , Deputy Clerk.

[Endorsements on the foregoing writ:]

No. .

Superior Court of the County of .

The People [etc.] ex rel. , plaintiff, }

v. }

, defendant. }

Writ of Habeas Corpus.

Filed on return, this day of , 19 .

, Clerk.

By , Deputy Clerk.

FORM No. 1280—Return to writ of habeas corpus or certiorari other than official. (Common form.)

[Title of court and cause.]

I do hereby certify and return to the Hon. A. B., a justice of the court, that I hold the said C. D. under and by virtue of a warrant issued by the governor of the state of for the arrest of the said C. D., under the name of J. K., and for his surrender to the authorities of the state of , by virtue of a requisition from the governor of that state, a copy of which warrant is hereto annexed, and the original of which I hold in my possession [or state other authority for the detention].

All of which I certify, and have here the body of the said C. D., as by the said writ I am commanded.

Dated , 19 .

R. S.

State of , }
County of . } ss.

R. S., being duly sworn, says, that the foregoing return is true. [Or otherwise verify as the statute of the particular state requires.]

R. S.

[Jurat.]

Writ, when denied.—A writ of habeas corpus will be denied where it appears that the judgment upon which the petitioner is imprisoned is one from which an appeal may be taken, thereby affording an adequate remedy at law: *Ex parte Flowers*, 2 Okla. Cr. 430, 101 Pac. 860, 863.

When writ will be granted.—A writ of habeas corpus will be granted, and the petitioner will be discharged in the proceedings thereon, where it appears that he is held in custody in proceedings before a justice of the peace where the record shows judgment, sentence, and commitment, but fails to show that plea was entered. Nor can the record be supplied by parol testimony or overthrown by such testimony: *Ex parte Walton*, 2 Okla. Cr. 437, 101 Pac. 1034, 1036.

The plea of once in jeopardy will not be reviewed or inquired into on habeas corpus. If pleaded and disregarded, it is an error to be corrected by appeal: *Ex parte King*, 10 Cal. App. 282, 101 Pac. 810, 811, citing *Church on Habeas Corpus*, § 253.

Extradition.—As to extradition upon a complaint charging the commission of an offense according to the form and procedure prescribed in the state in which the crime was alleged to have been committed, see *Morrison v. Dwyer* (Iowa), 121 N. W. 1064.

Order discharging an attachment for contempt against a trustee brought within the jurisdiction of the court by extradition proceedings based on a complaint and warrant on a charge of embezzlement of property under his control as trustee, affirmed in *State ex rel. v. Boynton*, 140 Wis. 89, 121 N. W. 887.

CHAPTER CXLVI.

Proceedings in Cases of Insanity.

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§ 509. CHARGES OF INSANITY, AND PROCEEDINGS THEREON. (Cal. Pol. Code, §§ 2168-2171.)

Whenever it appears by affidavit to the satisfaction of a magistrate of a county, or city and county, that any person therein is so far disordered in his mind as to endanger health, person, or property, he must issue and deliver to some peace officer, for service, a warrant

And it satisfactorily appearing to me that said is insane, and so far disordered in his mind as to endanger health, person, and property:

Now, therefore, you are commanded forthwith to arrest the above-named person, and take him before a judge of the superior court of the said county of , for a hearing and examination on the said charge of insanity.

And I hereby direct that a copy of this warrant, together with a copy of said affidavit, be delivered to said , at the time of his arrest; and I further direct that this warrant may be served at any hour of the night.

Witness my hand, this day of , 19 .

[Signature of magistrate.]

FORM No. 1285—Certificate of arresting officer.

Office of , county of , state of California:

I hereby certify that I received the above warrant of arrest on the day of , 19 , and served the said warrant by arresting the said , alleged to be insane, and bringing him before , judge of the superior court of said county of , on the day of , 19 ; and I further certify that I delivered a copy of said warrant of arrest, together with a copy of the affidavit of insanity, as directed in said warrant, personally to said , at the time of the arrest.

[Signature.]

FORM No. 1286—Certificate of medical examiners.

In the superior court of the county of , state of California.

In the matter of , an alleged insane person.

and , medical examiners in the county of , duly appointed and certified as such, do hereby certify, under our hands, that we have attended before a judge of said court at the examination of the said , and have heard the testimony of all witnesses sworn and examined upon said hearing, and have made a personal examination of the said , and have testified under oath before said court to the following facts, which were the result of said examination:

[Statements of facts.]

1. Name, , alleged insane person, resides at , county of , age, years; nativity, ; if foreign born, from what port or place did he come to the United States, and when and where did he land ; how long in California, ; place from which he came to this state, ; sex, ; color, ; occupation, ; religious belief, ; education—illiterate, reads only, common school, academic, collegiate, or unknown. [Strike out words not required.] Civil condition—single, married, widowed, divorced. [Strike out words not required.] If female and married, give maiden name, ; give maiden name of mother, ; number of children of mother: living, ; dead, .

2. Has either parent been addicted to the use of opium, cocaine, tobacco, or alcoholic beverages to excess, or other stimulating narcotics? .

3. Have any relatives been eccentric or peculiar in any way in their habits or pursuits? . If so, how? . Have any relatives, direct or collateral, suffered, or are they suffering, from any form of chronic disease, such as consumption or tuberculosis, syphilis, rheumatism, neuralgia, hysteria, or nervousness, or had epilepsy or falling sickness? .

4. Which parent does alleged insane person resemble mentally, ; physically, ; habits [cleanly or uncleanly] .

(a) Has alleged insane person ever been addicted to masturbation or sexual excesses? . If so, for how long? .

(b) Has alleged insane person ever had convulsions? . If so, when did he have the first one? . When the last one? .

(c) State alleged insane person's habits as to use of liquor, tobacco, opium, or other drugs, and whether excessive or moderate. .

(d) What is alleged insane person's natural disposition or temperament, and mental capacity? .

5. Has alleged insane person insane relatives? . If so, state the degree of consanguinity, and whether paternal or maternal. .

6. What is alleged insane person's general physical condition? .

7. Specify any disease of which alleged insane person has suffered, or does suffer, or any injury received. .

8. Has alleged insane person ever been an inmate of an institution for the insane? . If so, state when, where, and how long. . Whether discharged or otherwise. .

(a) Number of previous attacks . (b) Date of previous attacks . (c) Length of time each previous attack lasted .

9. Present attack began, . Was the present attack gradual or rapid in its onset? .

10. Is alleged insane person noisy, restless, violent, dangerous, destructive, incendiary, excited, or depressed? .

(a) Homicidal or suicidal? [If either homicide or suicide has been attempted or threatened, it should be so stated.] .

11. Age when menses appeared, .

(a) Amount and character before insanity appeared, .

(b) Since insanity appeared, .

12. Has the change of life taken place? .

(a) Was it gradual or sudden? .

(b) How changed from normal? .

13. Memory, .

(a) Sleep, .

(b) Headache or neuralgia, .

(c) Constipation or indigestion, .

(d) Hallucinations, .

(e) Delusions, [specify, if possible, and whether fixed or changeable].

14. What is the supposed cause of insanity?—Predisposing, . Exciting, .

Other facts indicating insanity. [State what the alleged insane person said and did in the presence of the examiners, and how changed in business or social habits, and disposition, as communicated to examiners by others.]

What treatment has been pursued [state remedies given, and whether hypodermically or not]? .

Whether patient has been restrained by muff, belt, or otherwise, .

Diagnosis: .

Name and address of correspondent, .

Telegraphic address, .

Relationship of correspondent to alleged insane person, .

And we do further certify that we believe the said is so far disordered in his mind as to endanger [state whether the danger is to health, person, and property, or either, or any, as the case may be].

Dated this day of , 19 .

[Signatures],

Medical examiners in the county of , state of California.

FORM No. 1287—Judgment of Insanity and order of commitment of insane person.

In the superior court of the county of , state of California.

In the matter of , an alleged insane person.

On this day of , 19 , a person alleged to be insane, was brought before me in open court, for a hearing and examination on a charge of insanity, on the affidavit of , charging him with insanity, made before, and on a warrant of arrest issued thereon by , a magistrate of said county of , and upon the order of this court, fixing the time and place for the hearing and examination of said charge, made in open court, and it appearing to the court that said alleged insane person, when said order was made, was then and there personally present in open court, and was then and there informed by the court that he was charged with being insane, and of his rights to make a defense to such charge, and of his right to be represented by counsel, and to produce witnesses on his behalf, and to have subpoenas issued to compel the attendance of witnesses, and was further informed that, if at such hearing and examination, he should be ordered committed, that he might, within five days after the making of such order of commitment, demand that the question of his insanity be tried by a jury before said superior court.

And it further appearing to the court, that the original order fixing the time and place for said hearing and examination was entered

in the minutes of the court by the clerk thereof, and a duly certified copy of said order was duly served on said alleged insane person, and upon _____, relatives of said alleged insane person, residing in said county of _____, as were deemed by the court necessary or proper persons to be served with notice of the arrest of said alleged insane person, and of hearing on said charge of insanity;

At said hearing and examination, said alleged insane person was represented by _____, an attorney of this court [appointed by the court for that purpose];

The court thereupon, in open court, proceeded with the hearing and examination of said alleged insane person, and [here naming witnesses] were sworn and examined as witnesses in regard to the mental condition of said alleged insane person, his financial condition, and that of the persons liable for his care, support, and maintenance.

At said hearing and examination, there were in attendance, and _____, two regularly appointed and qualified medical examiners of said county, who then and there heard the testimony of all the witnesses, and each of whom made a personal examination of said alleged insane person, and testified before the court as to the results of such examinations, and other pertinent facts within their knowledge.

Said medical examiners, after making the examination and hearing the testimony of the witnesses, and testifying as aforesaid, did make a certificate showing all the facts required by section 2170 of the Political Code, which certificate is hereto attached and made a part hereof.

Now, therefore, after such examination and certificate made as aforesaid, the court being satisfied from the testimony of said witnesses, and the truth of the matters set forth in said certificate, that said _____ is insane, and is so far disordered in mind as to endanger health, person, and property, and that it is dangerous for life, health, person, and property for such person to be at large, and that his condition is such as to require care and treatment in a hospital for the care and treatment of the insane;

It is therefore ordered, adjudged, and decreed, that said _____ is insane, that he be committed to and confined in the _____ state hospital, at _____, California.

It is further ordered and directed that _____, sheriff of the county of _____, take, convey, and deliver said _____ to the proper authorities of said hospital, to be held and confined therein as an insane person.

The sum of \$ _____ having been found on the person of said person at the time of his arrest, the said sheriff is ordered to take possession of the same and deliver it to the medical superintendent of said institution with said insane person.

Done in open court, this _____ day of _____, 19 ____.

[Signature],

Judge of the Superior Court [etc.].

FORM No. 1288—Statement of financial ability.

As to the ability of said _____ to pay for his care and support at the hospital, I find on diligent inquiry that said _____ is possessed of real estate of the estimated value of \$ _____, situated in _____, and of the following description: [Here describe]; also the following described personal property: [Here describe]; that said _____ is able to pay the sum of \$ _____ per month for his care and support at the _____.

Name and address of guardian: _____; residing at _____.

Or—

That said _____ has relatives as follows: [Here naming each known relative with his or her place of residence.] That said relatives are financially able to pay for the care and support of said _____, at the hospital, the sum of \$ _____ per month.

Dated _____, 19 ____.

[Signature],

Judge of the Superior Court [etc.].

FORM No. 1289—Clerk's certificate to affidavit, etc., judgment of insanity, order of commitment, etc. (Annexed to judgment.)

State of California,) ss.
County of _____.)

I, _____, county clerk and ex-officio clerk of the superior court of the county of _____, do hereby certify the foregoing to be a full, true, and correct copy of the original affidavit of insanity and order of arrest, order fixing time for hearing and examination, statement of financial ability, certificate of medical examiners, judgment of

insanity, and order of commitment on file in my office, and that I have carefully compared the same with the originals.

That the said A. B. is hereby accused of unprofessional conduct warranting his disbarment, upon the following facts, which facts are hereby made the basis of this charge and accusation, to wit: [Here set forth the facts showing (1) his conviction of a felony or

misdemeanor involving moral turpitude; or (2) wilful disobedience or a violation of an order of the court requiring him to do or forbear an act connected with, or in the course of, his profession which he ought in good faith to do or forbear, and any violations of the oath taken by him, or of his duties as such attorney and counselor; or (3) corruptly or wilfully and without authority appearing as attorney for a party to an action and proceedings; or (4) lending his name to be used as attorney and counselor by another person who is not an attorney and counselor, or any other acts made cause for disbarment by statute. Set out the facts fully upon each ground and all grounds of accusation.]

Wherefore, your informants pray, that the court make an order requiring the said A. B. to answer these accusations, and if upon an investigation thereof he be found guilty of the matters herein charged, that he be dealt with as the law directs.

M. N. [District Attorney of County], or
C. D. and E. F., for petitioners and informants,
in pro. per.

[Verification as in form No. 1291, or as otherwise provided by statute.]

FORM No. 1291—Verification of petition for disbarment. (California.)

State of California,) ss.
County of .)

E. F., being duly sworn, says: That he is one of the informants named in the foregoing accusation; that he has read the same and knows the contents thereof, and that the charges contained therein are true.

[Jurat of notary.]

E. F.

Verification of petition for disbarment.—Verification upon information of the informants in a proceeding for disbarment is insufficient: *In re Hotchkiss*, 53 Cal. 39, 40, citing Cal. C. C. P. §§ 290, 291; *In re Hudson*, 102 Cal. 467, 468, 36 Pac. 812.

Where the verification is in the exact language of the statute it is sufficient: *In re Collins*, 147 Cal. 8, 10, 81 Pac. 220.

FORM No. 1292—Order addressed to accused to appear and answer.

[Title of court and cause.]

To :

Whereas, on the day of , 19 , an accusation, in writing, duly verified by , was received and filed in this court,

charging that you have been guilty of [here state the offense] as a counselor and attorney-at-law, [if the accusation is accompanied also with affidavits, so state, designating the same by the names of affiants,] a copy [or copies] of which accusation [and affidavits] is [or are] hereto annexed and herewith served upon you; and the court being advised in the premises:

You are hereby ordered and required to appear and answer said accusation at the courtroom of this court on the day of , 19 , at the hour of o'clock of said day. [The time under the California statute, § 292 C. C. P., must be at least five days after date of service of this order.]

[Date.]

S. T., Superior Judge.

[Annex copy of accusation (and affidavits, if any).]

FORM No. 1293—Demurrer or objections to accusation.

[Title of court and cause.]

Now comes , the defendant named in the accusation filed herein, and appears and answers to the said accusation as follows:

Defendant demurs to said accusation upon the ground that the same does not state facts sufficient to constitute a cause for accusation or for the disbarment or suspension of defendant as an attorney or counselor.

And defendant further objects to said accusation upon the following grounds: [Here set forth any other objections as to the legal sufficiency of the accusation.]

Wherefore, defendant prays that said accusation be dismissed, and that he be given such other relief as may be proper.

M. N., defendant.

A. B., Attorney for defendant.

For the substance of an accusation for disbarment deemed sufficient as against demurrer, see the third count of the accusation in *In re Collins*, 147 Cal. 8, 18, 81 Pac. 220.

FORM No. 1294—Judgment of disbarment where the accusation is based upon a conviction of a felony.

[Title of court and cause.]

C. D. and E. F., having preferred charges, and having presented to this court and filed therein their accusation, in writing, duly verified as required by law, against the above-named , defendant; and proof having been made to the satisfaction of the court that a

copy of said accusation [etc.], together with an order to appear and answer, was duly served upon said , defendant; and whereas, the said , defendant, interposed an answer thereto and hearing upon said accusation, and the answer thereto was in due course regularly had; and the court having heard the proofs, wherefrom it appears that the said charge in the said accusation is true, and that on the day of , 19 , the said defendant was by a judgment duly given, made and rendered in the court of , state of , convicted of [here state the felony charged]:

Now, upon all the papers, testimony, and proceedings herein:

It is hereby ordered and adjudged, that the name of said , defendant, be and the same is hereby authorized to be stricken from the roll of attorneys and counselors of this court, and that defendant be and he is hereby precluded from henceforth practising as an attorney or counselor at law in any of the courts of this state.

[Date.]

S. T., Superior Judge.

FORM No. 1295—Judgment or order of suspension.

[Title of court and cause.]

[After recitals as to filing of the accusation, and service thereof, together with the order to appear and answer, of the hearing thereon, and of the proofs and findings of any charge (specifying it) under the statute warranting the court in pronouncing judgment of suspension:]

It is ordered and adjudged, that the defendant herein be and he is hereby deprived of the right to practise as an attorney or counselor in the courts of this state for the period of [here designating the period for which the suspension is to continue].

[Date.]

S. T., Superior Judge.

CHAPTER CXLVIII.

Proceedings in Juvenile Courts.

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[Note: The manifest injustice which so long prevailed in dealing with the delinquencies and offenses of children has prompted the author to include a chapter devoted to this subject in this, a work relating to civil matters. To classify the delinquent acts of juvenile offenders as crimes, or even as quasi-crimes, in the sense in which these terms are ordinarily understood, is not only unjustly, but, we submit, to falsely, stigmatize such acts and the children who may be the unfortunate, misguided, or indiscreet offenders. The reason for this statement is that offenses committed by children are never, beyond a reasonable doubt, characterized by the one absolutely essential characteristic of every crime—a criminal intent, i. e., an intent which is based upon understanding and purpose. The statement might be ventured that the very commission of the offense by a person of immature years itself points the deficiency and weakness. It may be questioned whether retributive, as opposed to reformative or corrective, measures are ever justified in dealing with even adult offenders; but as to delinquent children, who are naturally of immature understanding, generally vacillating in will, and almost invariably unfortunate in their environments, there can be no reasonable or humane dissent from the principle that the measures brought to bear upon them and their delinquent acts should in every case be corrective only, and as far removed as possible from the terminology, methods, and practices incident to jurisdiction over crimes.]

[References to statutes.]

California: In this state there are no distinctively juvenile courts. The superior courts are vested with jurisdiction in all matters relating to delinquent and dependent juveniles. For the statutes relating to this subject, see Henning's Gen. Laws, p. 115; Kerr's Bienn. Supp. 1906-1909, pp. 1471-1484; Employment of Minors, Henning's Gen. Laws, p. 122; Kerr's Bienn. Supp. 1906-1909, pp. 1495-1498.

Arizona: See Laws 1907, p. 142 et seq.

Colorado: Juvenile courts, see Rev. Stats., §§ 1589 to 1607; Sess. Laws 1907, ch. 149, p. 324; Laws 1909, ch. 156, p. 334 et seq.

Hawaii: Laws 1905, Act. 28, p. 31; Laws 1907, pp. 32, 36; Laws 1909, Act. 22, p. 22 et seq.

Idaho: Juvenile delinquents, Rev. Pol. Code, §§ 823-832; Prob. and Jus. Cts., §§ 8328-8337; Sess. Laws 1909, pp. 7, 224, 272. (Form of commitment, Pol. Code, § 824.)

Iowa: Juvenile courts, detention homes, etc., Supp. 1907, ch. 5-b, § 254-a 13 to 254-a 30; Laws 1909, ch. 13, p. 14.

Kansas: Juvenile courts, Gen. Stats. 1905 (Dassler), §§ 4412-4426; Laws 1909, p. 277 et seq.

Minnesota: Juvenile offenders, Rev. Laws 1905, §§ 5496-5503; Laws 1907, pp. 106, 193, 550; Laws 1909, pp. 354, 507.

Missouri: Delinquent and neglected children, 3 Mo. Ann. Stats. 1906, §§ 5251-3 to 5251-56, pp. 2732-2748.

Montana: Delinquent children and juvenile offenders, Rev. Codes 1907, §§ 9423-9439; Laws 1907, pp. 224-232.

Nebraska: Juvenile courts, etc., Ann. Stats. 1909 (Cobbey), §§ 5451-5490.

Nevada: Delinquent children, Stats. 1908-1909, pp. 229-241; contributory dependency and contributory delinquency, pp. 203-206.

North Dakota: Reform school, Stats. 1907, pp. 288, 377; dependent children, Stats. 1907, p. 121; regulating child labor, Stats. 1909, p. 181. North Dakota Rev. Codes 1905, § 9511, provides: "Whenever any person under the age of sixteen years is convicted of an offense punishable by imprisonment in the penitentiary, the court before whom such conviction was had may, in its discretion, sentence the person so convicted to imprisonment in the county jail of the county in which such conviction was had." [Note: While the statute above quoted is a partial recognition of the principles which govern recent legislation upon the subject of juvenile courts and juvenile offenders, nevertheless the legislature of that state, and of other states where similar laws prevail, should, we submit, give greater latitude to the courts in dealing with this class of cases. The fact that there must first be a conviction is not a safeguard to the welfare of the child for the reason that the principal harm is by the trial and conviction themselves inflicted upon him.]

Oklahoma: Juvenile offenders, Comp. Laws 1909 (Snyder), §§ 8518-8565.

Oregon: Codes and Stats. 1902 (Bel. & Cot.), § 1449 et seq.; acts as to employment of minors, Laws 1907, p. 302; Laws 1909, p. 194.

South Dakota: Delinquent minors, Rev. Code Crim. Proc. 1903, § 770; Pol. Code, §§ 3205-3214; as to contributory dependency and contributory delinquency of children, see Sess. Laws 1909, pp. 421-424.

Texas: Supp. Stats. 1908 (Sayles), p. 124, §§ 1-7; Supp. Stats. 1910 (Sayles), p. 212, Arts. 2941-2953.

Utah: Juvenile courts, Laws 1909, ch. 122, p. 324; as to dependent, neglected, and ill-treated children, Laws 1909, ch. 123, p. 331.

Washington: Delinquent children, Codes and Stats. 1910 (Rem. & Bal.), §§ 8005-8615, Sess. Laws 1905, p. 34; reformatories, §§ 4380-4386, Laws 1905, p. 39.

Wisconsin: Juvenile courts, Stats. 1907, ch. 573-1 to 573-9, p. 762.

Wyoming: Juvenile delinquents, Rev. Stats. 1899, §§ 4930-4934 and § 4935 as amended in Laws 1903, ch. 106; Rev. Stats. 1899, § 4936 et seq.

**FORM No. 1296—Petition for arrest and examination of a delinquent minor.
(California.)**

The People of the state of California }
in behalf of }
a delinquent child. }

State of California, } ss.
County of . }

To the Honorable Superior Court of the county of , state of
California:

Your petitioner, , respectfully represents that he is a citizen
of the United States and of the state of California, over the age of
twenty-one years; that the above-named , a child under the age
of sixteen years, to wit, the age of years, on or about the
day of , 19 , is now within said county, and that said child is a
delinquent child within the meaning of the statute made and
provided, in this, that said child [here state the reasons for such
delinquency]; that the said child is now in the custody and under
the control of ; that the names and residences of the relatives
of said child living in said county are as follows: [Here state]; that
in order to secure the attendance of said child at the hearing of said
matter it will be necessary that a citation be issued to the said cus-
todian of said child, and to [here set forth names of such other par-
ties as may be cited to appear].

Wherefore, your petitioner prays, that a citation issue command-
ing that the said appear before this court on the day
of , 19 , at o'clock M., with the said minor herein
named, and that upon the hearing the said minor be dealt with
according to the provisions of the statute.

[Signature.]

[Verification.]

FORM No. 1297—Citation to parent or custodian. (California.)

[Title of court and cause.]

The people of the state of California to [parent or custodian]:

You are hereby cited and required to appear before this court in
the city of , in the county of , state of California, at the
courtroom of department No. , on the day of , 19 ,
at o'clock M. of that day, and bring with you the above-
named , a child under the age of sixteen years, and then and

there to show cause, if any you have, why said child should not be declared to be a delinquent child, according to the petition on file herein.

And for failure to attend and bring said child with you, you will be deemed guilty of a contempt of court.

By order of the superior court, in and for the county of _____, the seal of said court affixed, this _____ day of _____, 19 ____.

[Seal.]

_____, Clerk.

By _____, Deputy Clerk.

FORM No. 1298—Certificate of service of citation. (California.)

Office of the Sheriff of the }
county of _____ . }

I hereby certify, that I received the within citation on the day of _____, 19 __, and personally served the same on the _____ day of _____, 19 __, at _____, in the said county of _____, upon the within-named _____, by delivering a copy of said citation to _____ personally on the day last aforesaid.

[Date.]

_____, Sheriff.

By _____, Deputy Sheriff.

FORM No. 1299—Notice to parents, custodian, or guardian. (Utah practice, Laws 1909, p. 327.)

[Title of court and cause.] ¹

To _____, [here designate relationship]:

You are hereby notified to appear within two days after the service of this notice upon you, if served within the county wherein the above proceeding is pending, otherwise within five days, and assert and defend any rights to custody, control, or guardianship you may have or claim over or in the above-named child; otherwise, your default will be entered and the court will proceed to hear and determine your said rights, or supposed rights, in accordance with the law and the evidence.

A. N., probation officer [or sheriff,
or other peace officer].

[Return of officer showing service to be annexed, which return is by statute made conclusive.]

¹ Under the Utah statutes, the title is provided to be: "State of Utah in the interest of _____, delinquent": Laws 1909, ch. 122, § 720x4, p. 326.

FORM No. 1300—Subpoena. (California.)

[Title of court.]

The People of the state of California }
in behalf of }
a delinquent [or dependent] child. }

The people of the state of California to :

We command you, that all and singular business and excuses being laid aside, you appear and attend our superior court of the state of California, in and for the county of , the day of , 19 , at o'clock M., then and there to testify in the above-entitled matter now pending in said superior court , and for a failure to attend you will be deemed guilty of a contempt of court.

Witness the Hon. , judge of the superior court, in and for the county of , and the seal of said court, this day of , 19 .

Attest my hand and seal of said court, the day and year last above written. , Clerk.

[Seal.]

By , Deputy Clerk.

FORM No. 1301—Sheriff's certificate of service of subpoena. (California.)

Office of the Sheriff of the }
county of , }
state of California. }

I hereby certify that I served the within subpoena on the day of , 19 , on , being the witness [or witnesses] named in said subpoena, at , in the county of , by showing the original to said witness [or witnesses] personally and informing him [or them] of the contents thereof.

[Date.]

, Sheriff.

By , Deputy Sheriff.

FORM No. 1302—Commitment of dependent child. (California.)

[Title of court.]

In the matter of , }
a dependent child. }

The above-named , having been regularly brought before the above-entitled court upon petition duly verified and filed herein, as

provided by law, said petition showing that said is within the said county of , and is a dependent child within the meaning of the law, and due notice of the hearing of said petition having been given as required by law and the order of this court, and due return having been made on the citation issued herein, upon a full hearing of said petition and of the case, it appearing to the satisfaction of the court that said is under the age of sixteen years, to wit, of the age of , and that he resides within said county of , and is a dependent child within the meaning of the law; and it further appearing that it is for the best interest of said child that he be committed to the care of , and that said is willing to receive said child, if committed thereto by this court:

Now, therefore, it is hereby ordered, adjudged, and decreed, that said is a dependent child within the meaning of the law, and that he should be, and he is, hereby committed to the care of , for a period of from the date hereof.

Done in open court, this day of , 19 .

S. T., Judge.

FORM No. 1303—Commitment of delinquent child. (California.)

[Title of court.]

In the matter of , }
a delinquent child. }

The above-named , having been brought before the superior court of the state of California, in and for the county of , upon the order and certificate of the justice court of township of said county, as a delinquent child, charged in the court with the offense of , and due notice of the hearing of said charge having been given as required by law and the order of this court, and due return having been made on the citation issued herein, upon a full hearing in this court had on the day of , 19 , it appearing that it is for the best interest of said that he should be committed to the care of for the period of :

Now, therefore, it is hereby ordered and adjudged, that said be and he is hereby committed to the care of , for the period of from the date of this order.

Done in open court, this day of , 19 .

S. T., Judge.

FORM No. 1304—Bench warrant. (California.)

[Title of court and cause.]

State of California, }
County of . } ss.

The people of the state of California to any sheriff, constable, marshal, policeman, or special police officer in this state:

A verified petition having been filed on the day of , 19 , charging , a child under the age of sixteen years, with being a child:

You are therefore commanded forthwith to arrest the above-named and bring before this court, or, if the court be not in session, that you keep in some suitable place pending the further order of this court.

Witness my hand and the seal of the court, this day of , 19 .

S. T., Judge of Superior Court.

FORM No. 1305—Order directing time of service of bench warrant. (California.)

State of California, }
County of . } ss.

Superior Court, Dept. .

This warrant may be served and executed by day or night, and the arrest, as commanded in this warrant, is hereby authorized and directed to be made at any time of the day or night.

Dated this day of , 19 .

S. T., Judge of Superior Court.

FORM No. 1306—Return endorsed upon bench warrant. (California.)

State of California, }
County of . } ss.

To the Honorable the Superior Court, department No. , of the county of :

I, the undersigned , do hereby make this my return to this warrant, and do hereby certify that I have executed and served this warrant by arresting the within-named defendant this day of , 19 , who at the time of the arrest declares his true name

to be _____; and I do herewith bring said defendant before the
superior court, department No. _____, as commanded in this warrant.

[Date.] [Signature of officer.]

S. T., Judge of Superior Court.

[Judge's signature.]

[Endorsement of receipt of commitment.]

Received from _____, [deputy] sheriff of _____ County, _____, this
day of _____, 19 ____.

[Signature],

Superintendent

School of Industry.

[Request for information concerning delinquent endorsed on commitment.]

Under the California practice, the committing magistrate is generally requested to furnish to the school, upon the oath of the defendant or some competent witness, the following information:

Date of birth: _____.

Place of birth: _____.

If foreign born, state country, and number of years he has been in the United States: _____.

Parents—Divorced? _____ Living apart? _____.

Father: Name, _____ Living? _____.

Address: _____.

Place of birth—United States? _____ Foreign? _____.

If foreign born, state country, and number of years he has been in the United States: _____.

Occupation: _____.

Character—Intemperate? _____ In jail or prison? _____.

Mother: Name, _____ Living? _____.

Address: _____.

[State whether divorced, re-married, or living apart from husband.]

Place of birth—United States? _____ Foreign? _____.

If foreign born, state country, and number of years she has been in the United States: _____.

Character—Intemperate? _____ In jail or prison? _____.

If parents are dead, or lost, name and address of guardian or near relatives: _____.

Defendant's character—Does he use tobacco? _____ Cigarettes? _____.

Intemperate? _____.

Former convictions [if any]: _____.

[Verification.]

[Signature.]

FORM No. 1309—Order of commitment to boys' school of industry. (From court of limited jurisdiction—California.)

State of California, }
County of _____ } ss.

_____, a boy of the age of _____ years, having been found guilty by the _____ court of the county of _____, state of California, a court of competent jurisdiction, of the offense of _____, and he being, in the opinion of the court, a fit subject for commitment to the school of industry, at _____, the court doth now suspend judgment [or sentence, as the case may be];

And conformable to the provisions of an act of the legislature of the state of California, entitled "An act to establish a school of industry, to provide for the management and maintenance of the

same, and to make an appropriation therefor," approved , 19 , and the several acts amendatory thereof or supplemental thereto:

It is ordered, that the said be and he is hereby committed to the said school of industry, for the term of years, unless sooner discharged, as in said act provided.

It is further ordered, that , sheriff of County, do forthwith take into his custody the said , and deliver him to the superintendent of the said school of industry, at , California, together with this commitment.

And this is to authorize the superintendent of said school of industry to receive and safely keep the said for the period of years, or until he is legally discharged.

[Date.] S. T., Judge of the Court of the city of .

[Approval of foregoing commitment by superior judge.]

State of California, }
County of . } ss.

The commitment of the within-named to the school of industry, at , for the period within named, is hereby approved by me, judge of the superior court of the county aforesaid, this day of , 19 .

Attest: S. T., Judge.

, Clerk.
By , Deputy Clerk.

FORM No. 1310—Affidavit on application for a permit for a minor child to work. (California.)

[Title of court and cause.]

State of California, }
County of . } ss.

, being first duly sworn, says: That he is the [here state if parent or guardian] of , a minor child; that said child is over the age of twelve years, to wit, of the age of years, and that the parent[s] of said child is [are] incapacitated from performing any labor through illness.

Subscribed and sworn to before me, this day of , 19 .
[Seal.] , County Clerk.

By , Deputy Clerk.

FORM No. 1311—Recommendation that permit issue.

[Title of court and cause.]

I hereby certify, that I have investigated the case of _____, and recommend that a permit be issued allowing said child to work, said child being able to read and write.

C. D., Probation Officer.

By _____, Deputy.

FORM No. 1312—Order granting permit.

[Title of court and cause.]

In accordance with the above sworn statement and recommendation, the above-named _____ is permitted to work for _____ hours per day between the hours of 7 o'clock A. M. and 10 o'clock P. M., at such occupations as are or may hereafter be permitted and authorized by law. This permit to be good for one year from the date hereof.

[Date.]

S. T., Judge of the juvenile department
of the superior court of the county
of _____, state of California.

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